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WILHELM WENGLER

Laws Concerning Unfair Competition and the Conflict of Laws

Preliminary Remarks

What are rules against unfair competition?

An inquiry respecting the scope of applicability of legal provisions concerning unfair competition presupposes some remarks on what is meant by "laws concerning unfair competition," as discussed in this article. We exclude for the purpose of this article all restrictions on competition based on *contract*, and we comprise under the term "rules concerning unfair competition" all those rules of private law contained in legislative enactments or judge-made or customary laws, which prohibit or restrain any acts done in order directly or indirectly to promote the sale of goods, services, etc.; such rules usually entitle other persons, especially business competitors, to actions for damages or to an injunction of the court in case of an infringement. Our definition comprises all imaginable rules concerning unfair competition, regardless of which of these imaginable rules are already in force as positive law. Therefore, it does not afford any information on what acts of competition are prohibited in a given country, and what acts are prohibited expressly as "unfair competition." It must also be understood that competitive activities, even if they are qualified by law as "unfair competition" and legally prohibited, do not necessarily coincide with such activities as are considered "unfair" by custom and morality. It is quite possible that certain competitive acts are qualified as "unfair" and forbidden by law, although these acts are not disapproved morally by general opinion, but the reverse also is conceivable. Misunderstandings would perhaps be most effectively avoided by speaking of "competitive activities prohibited by operation of the law," instead of using the words "unfair competition." For our definition of the rules concerning unfair competition, it is of no importance whether actions in the case of a violation of such rules can be brought only if wilful intent or negligence of the de-

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fendant is proved.[1] Our inquiry, on the other hand, is restricted to *civil* actions arising from "unfair competition" or "competition prohibited by operation of the law." Sometimes violations of such rules give rise also to criminal actions and penal sanctions, or they may be enforced by administrative or disciplinary measures;[1a] our inquiry, however, deals only with the question of applicability of such provisions as concern the civil effects of a legally prohibited act of competition.

Private law rules forbidding competitive acts are sometimes contained in special statutory provisions prohibiting "unfair competition" as a whole and defining it for this purpose; very often the statutory provision is only a "*Generalklausel*," which does not give a definition of "unfair competition" and leaves it to the courts or to a generally accepted opinion of the public or of certain groups to decide what competitive activities are to be regarded as "unfair" and, consequently, as unlawful.[1b] The legal basis for civil actions against unfair competition is found in other countries in those provisions of their civil codes which grant in general terms damages for all "unlawful" or "immoral" acts[2]; here again, it may be that the decision what shall be regarded as "immoral," and consequently which acts of competition are to be regarded as "unlawful" or "immoral," is left by the legislator to the courts or to the general opinion of the public. On the other hand, there are countries where the statutory law forbids expressly certain enumerated competitive acts,[3] without using the term "unfair competition;" such statutory provisions must also be included in the scope of our inquiry, as a matter of course. The development of the law in many countries shows that certain competitive

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[1] *Cf.* the distinction between "concurrence déloyale," which presupposes "mauvaise foi," and "concurrence illicite" in French law; see Mermillod, Essai sur la notion de concurrence déloyale en France et aux Etats-Unis, Paris 1954, pp. 111 ff.

[1a] In some countries disciplinary measures against unfair competitive acts may be taken by officially recognized professional organizations, e.g., of surgeons; *cf.* for the French law Mermillod, *loc. cit.*, pp. 48 ff. In the United States, the Federal Trade Commission acts against unfair competition in interstate and foreign commerce by means of orders to cease and desist. The institutions created by the national socialist legislation in Germany for the administrative regulation of competition, namely the Werberat der Deutschen Wirtschaft, have been abolished after May, 1945.

[1b] Statutory provisions of this kind are to be found, for instance, in Germany, Austria, Hungary, Switzerland, Yugoslavia, Norway, Greece, and Spain.

[2] Thus, the French and the earlier Italian law, also the Dutch law and that of other countries who have adopted or imitated the French Code. See also OGH Wien 11.6.1930, SZ 12 Nr. 142, on the Austrian law.

[3] Thus, most of the countries mentioned in note 1, in addition to their sweeping clauses. No sweeping clause is contained in the statutes against unfair competition of Denmark, Sweden, Greece, and Poland. A close examination of the Anglo-American common law also reveals only some specific tort rules prohibiting certain acts of unfair competition.

acts (e.g., the use of false indications of origin) are at first brought by the courts under the civil code provisions granting damages generally for "unlawful" or "immoral" acts; later such acts of unfair competition are defined more closely by special statutes, and the legal consequences are regulated in detail. In other countries, the courts have refused to apply the above-mentioned general clauses of the codes regarding torts to such competitive acts, and the law has had to be "corrected" by legislative action, viz. by the enactment of special statutes forbidding certain enumerated competitive acts. Trademark legislation also may be regarded as legislation against special aspects of unfair competition.

Another preliminary remark will be useful: A distinction may be made between legal provisions which forbid certain competitive acts to everybody, and legal provisions allowing such acts to certain privileged persons and prohibiting them to all others. To the latter group belong for instance the legal provisions concerning the use of a trade name or of a typical equipment of commercial articles; the legal provisions concerning trade marks and patents likewise favor the competitive activities of those persons for whom they are registered. We shall not deal with the question, if in a given country resort to the legal provisions concerning "unfair competition" is completely excluded when such exclusive rights have been secured or might have been secured. Although in general there is no need to resort to the general provisions concerning unfair competition where a particular protection exists for patents and trade marks, the laws of some countries show that sometimes the general provisions against unfair competition take over the protective functions that are performed in most countries by special statutes on patents and trade marks.[4] Nevertheless, statutes granting these particular protective rights belong with the general provisions concerning unfair competition in one greater category; frequently at first, conflict rules regarding patents and trade marks are determined by legislation or by the courts, and influence the determination of the conflict rules regarding other matters of unfair competition.

Art. 10bis of the Paris Convention

It is a commonplace that conflicts of laws do not arise once a given matter is subject to identical rules of private law in all countries. Therefore, if there were internationally uniform rules against unfair competi-

[4] For example: During the first years after 1945, when no German patent office was in operation, the German courts provided a certain protection to inventors by means of the provisions against unfair competition.

tion, granting identical actions in case of infringement, there would be no question of delimitation between the national laws against unfair competition, in any case not for the relations between countries which adopted the uniform regulations. One uniform rule against unfair competition is actually provided by art. 10^{bis} of the Paris Convention for the Protection of Industrial Property, revised by the Hague Convention of Nov. 6, 1925, and the London Convention[5] of June 2, 1934; it reads:

(1) Les pays de l'Union sont tenus d'assurer aux ressortissants de l'Union une protection effective contre la concurrence déloyale.

(2) Constitue un acte de concurrence déloyale tout acte de concurrence contraire aux usages honnêtes en matière industrielle ou commerciale.

(3) Notamment devront être interdits:

1° tous faits quelconques de nature à créer une confusion par n'importe quel moyen avec l'établissement, les produits ou l'activité industrielle ou commerciale d'un concurrent;

2° les allégations fausses, dans l'exercice du commerce, de nature à discréditer l'établissement, les produits ou l'activité industrielle ou commerciale d'un concurrent.

(1) The countries of the Union are bound to assure to nationals of countries of the Union an effective protection against unfair competition.

(2) Any act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition.

(3) The following particularly are to be forbidden:

1° All acts whatsoever of a nature to create confusion in any way whatsoever with the establishment, the goods, or the services of the competitor;

2° False allegations in the conduct of trade of a nature to discredit the establishment, the goods, or the services of a competitor.

In some signatory states, art. 10^{bis}, par. 1, is interpreted as an obligation of the national legislator, imposed by public international law, to introduce into the national law detailed provisions granting effective protection against unfair competition, if such provisions are not yet in force[6]; in some other countries, it is held that transformation of the Convention into national law entitles a competitor injured by one of the acts described in art. 10^{bis}, par. 2, to actions for damages or for an in-

[5] Regarding the history of these regulations, *cf.* Plaisant, Répertoire de droit international, V (1929), 449 ff.

[6] *Cf.* OGH Wien 11.6.1930 (above note 2).

junction of the court.[7] At last it seems to become a generally accepted opinion that art. 10^{bis} of the Convention indicates the minimum of what is to be regarded as unlawful competition in any signatory state,[8] even if there is in that country a law against "unfair competition." National rules giving broader protection than art. 10^{bis} are not abrogated by this provision, but as to that part of the national laws the question of the territorial sphere of applicability will arise. Art. 10^{bis} of the Paris Convention does not delimit its application in the relation between the countries parties to the Convention and other countries; it seems that this question has not yet been examined by the courts; nevertheless, it is, obviously, an open question, for instance, whether it is sufficient that the competitor protected by art. 10^{bis}, par. 3, sec. 1, is a national of one of the signatory states having entered the agreement, or if the competitive acts complained of must have also a closer connection with their countries, and how this connection is to be qualified. Furthermore, art. 10^{bis}, par. 2, does not give an answer to the question whether the "honest practices in industrial or commercial matters" are supposed to be the same in all countries having acceded to the Convention.[9] If they are not, it may be that these rules of practice themselves determine in what territory and for whom they are to be binding.[10] This question, too, has hardly been studied by the courts. Most of the authors dealing with unfair competition do not even see the problem.

Methods of Determining the Sphere of Application of the Rules Against Unfair Competition

Application of the lex loci delicti

As long as in most countries actions against unfair competition cannot be based on the Paris Convention alone, but must be founded on the general clauses or on the specific prohibitions contained in the national laws, as mentioned in the beginning, the question how to determine the sphere of applicability of these rules becomes inevitable. Prima facie, it

[7] Regarding the Italian law, *cf.* Gueli in: Nuovo Digesto III (1938) 674.

[8] *Cf.* Plaisant, La notion internationale de la concurrence déloyale, in: Propriété Industrielle 1949, 166.

[9] In favor of this interpretation: Cass. Roma 29.1.1941, Diritto Internazionale 1941, 247, 250.

[10] In his important essay on the conflict of extralegal rules (*Sozialnormen*), 11 Zeitschrift für öffentliches Recht (1931) 34 ff., at p. 60, Neumeyer considers the possibility that a legal rule adopting extralegal rules into the law intends to adopt also the sphere of application which the extralegal rule in question requests for itself. According to Neumeyer, it depends on the intentions of the legal rule whether the sphere of application of the legal rule shall be identical with that of the extralegal rule, or if it must be determined otherwise.

seems reasonable to give all actions based on unfair competition exactly the same treatment in the conflict of laws as all other actions on torts. In a number of countries, as we have seen,[11] the actions resulting from acts of unfair competition are justified by the general provisions of the codes granting damage claims for "unlawful" or "immoral" acts; in other countries actions based on the special statutes against unfair competition are in some respects qualified as tort actions, for instance if the period of limitation for tort actions is not the same as for other actions. Since in most countries the *lex loci delicti* is applied to tort actions, it is the prevailing opinion there that the *lex loci delicti* is applicable also to all private law actions based on acts of unfair competition.[12]

In most cases when the courts determine the law applicable to actions based on unfair competition by means of the *locus delicti*, it is the *lex fori* which comes to be applied; it is very rare that foreign laws against unfair competition are applied. If one starts with the *locus delicti* rule several questions will arise: the problem whether the *locus delicti* is only the place where the defendant acted himself, or whether it may also be the place where his accomplices acted;[13] the problem whether the *locus delicti* is the place where the injurious competitive act was committed, or the place where the effects of such an act (decrease of the plaintiff's sales) occurred;[14] finally whether the *locus delicti* is also the place where "preparatory acts," acts preceding the very act of unfair competition, are accomplished;[15] all these questions are answered in the different countries in different ways, according to the different interpretation of the *locus delicti* rule in every country.[16] In matters of unfair competition, there is a general tendency to give a very broad meaning to the *locus delicti*.[17]

[11] *Cf.* note 2 above.

[12] Details in the national reports for the 4th Congress of Comparative Law, Paris 1954, for Belgium (van Bunnen, 31 Rev. D. Comp. 1954, no. spécial, p. 118 ff.), Germany (Schwenn), and France (Goré). Regarding the law of the United States, *cf.* Schopflocher, 148 A.L.R. 139 ff, and note 60 Harv. L. Rev. (1946/47) 1311 ff. Regarding the law of Switzerland, *cf.* Handelsgericht Zürich 6.5.1952, Bl. Zürch. Rspr. 1953 No. 77. As for the Netherlands, see Dubbink, De onrechtmatige daad in het internationaal privatrecht, ('s-Gravenhage 1947), pp. 90, 93. For an international survey, see Rabel, 2 Conflict of Laws (1947), 255 ff.

[13] *Cf.* RGZ 150, 265.

[14] The decisions of the German courts on the question whether the place of commission or the place of the effect is of decisive importance, are collected in the report of Schwenn (n. 12 above) on German law, not yet published.

[15] In favor of inclusion, Martin Wolff, Das internationale Privatrecht Deutschlands[3], (1954), 164. See also Cass. Roma 2.4.1927, Giur. Tor. 1927, 642.

[16] *Cf.* Ehrenzweig in: 1 Festschrift für Rabel (Tübingen 1954) 655 ff., esp. 679 ff.

[17] Thus, e.g., the German courts; see recently BGH 13.7.1954, NJW 1954, 1931. See also Handelsgericht Zürich, n. 12 above (*either* place of commission *or* place of effect is sufficient).

Besides the *locus delicti* rule, another point of view sometimes influences the determination of the sphere of application of the rules against unfair competition. If special statutes make certain acts of competition a monopoly of a person (usually the owner of a patent or of a trade mark) forbidding these acts to everyone else, it is frequently concluded from the "territorial nature" of these "immaterial rights" that the monopoly to do these acts refers only to acts done in the country the legislator of which granted the right, so that the owner of such monopolistic rights is entitled to actions against other persons only if the reserved acts of competition occur *in that country*.[18] Occasionally, this has been used as an argument for the contention that all other rules against unfair competition are likewise applicable only to *acts committed* in the country whose laws provide these rules.[19]

Writers generally believe that the courts of a given country have to apply foreign rules against unfair competition, if the *locus delicti* happened to be in a foreign country;[20] but I have mentioned above that only few decisions can be found giving judgment for the plaintiff on the basis of a foreign law against unfair competition.[21]

In the different countries, the *lex loci delicti* rule in its application to acts of unfair competition is subject to the same restrictions and modifications as it is for other torts. In England, for instance, a wrong not justifiable by the foreign *lex loci delicti* must be actionable also under English law, if the action is brought before an English court. A somewhat different rule exists in German private international law: though in principle the *lex loci delicti* applies to torts, the liability of a German national for

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In conflicts between the laws of American States, however, where the impacts of an act of unfair competition took place in a great number of States, courts try to resort to the place of principal wrong or to the place of greatest damage; *cf.* 60 Harv. L. Rev. 1318 ff.

[18] For decisions, see n. 44 below.

[19] See, for instance, Reimer, Wettbewerbs- und Warenzeichenrecht[2] (Berlin 1947), p. 92, 246, 265, 396.

[20] Regarding the German law, *cf.* Baumbach-Hefermehl, Wettbewerbs- und Warenzeichenrecht[6], (München 1951), p. 49.

[21] RGZ 129, 385 is ready to apply foreign rules against unfair competition, but dismisses the action in that case, because according to art. 12 EGBGB the liability of the German defendant was limited by German law, and the action was barred by the German statute of limitations. C. App. Aix 19.12. 1892, Sirey 1893, 2, 201, is also ready to apply the rules against unfair competition provided by the foreign *lex loci delicti*, but dismisses the action, since the rules of the law of Monaco applicable in the case were not compatible with the French "*ordre public*." Trib. Civ. Torino 26.7.1941, Rivista di Diritto Commerciale 1915, II, 166, gives judgment for the plaintiff applying the German Gesetz über den unlauteren Wettbewerb. Since our inquiry is restricted to the conflict of laws, we will not enter into the question whether in all countries the courts have jurisdiction to deal with acts of unfair competition committed abroad.

damages, if the tort has been committed abroad, is not greater than according to the German law of torts (*cf.* Art. 12 EGBGB). This rule gives rise to interesting questions when an industrial property right protected in a foreign country, for which no analogous right exists in Germany, is infringed in that foreign country, and an action based on the foreign law is brought in a German court against a German defendant; does the above-mentioned rule mean that the action must be dismissed, since no corresponding right is protected in Germany—or does it mean that only such actions may be maintained *as would* exist according to German law *if* a corresponding protective right had been secured in Germany? The courts have preferred the latter interpretation.[22]

Nationality and domicile of the parties

What the courts and the legal writers say about the "*locus delicti*" in matter of unfair competition is not more interesting than that what is generally said about the *locus delicti* rule regarding torts. Much more exciting are the trends to determine the law applicable to unfair competition either *instead of or beside* the *locus delicti* principle by means of other "*points de rattachement.*" We should mention here the old idea that rules reserving the accomplishment of certain acts of commercial competition to a privileged person—for instance the use of a certain name of a trade mark—are to be regarded as rules constituting "intangible personal rights" (*Persönlichkeitsrechte*); the courts decided that actions arising from an infringement of such rights must be judged according to the laws of the plaintiff's native country or the country of his domicile, regardless of the place where the injurious act has been committed. As far as unfair competition is concerned, this tendency seems to have been given up entirely by the courts.[23]

[22] RGZ 129, 385 (infringement in Norway of a Norwegian trade mark, for which no corresponding right existed in Germany). To the contrary are the earlier decisions of the Reichsgericht; see JW 1890, 280, and JW 1899, 444.

[23] Namely in Germany, *cf.* RGZ 118, 80; RG 11.3.1936, Gewerblicher Rechtsschutz und Urheberrecht 42 (1937) 148; RG 18.1.1939, Markenschutz und Wettbewerb 39 (1939) 222. In the same sense, Ingenohl v. Olsen & Co., 273 U.S. 541. But see OGH Wien 7.3.1933, SZ 15 Nr. 107, and Steele v. Bulova Watch Co., n. 29 below.

The idea that a trade mark is closely connected with the chief place of business of the owner lies at the bottom of the rule to be found in the law of many countries that a trade mark cannot be registered for foreign firms unless an identical trade mark has been registered previously in the country of a firm's chief establishment. In matters of unfair competition, however, it is nowhere required that a foreigner bringing an action before a domestic court should be entitled to the same protection in his home country; but in some countries foreigners can bring an action founded on the *lex fori* only if domestic citizens enjoy an analogous protection by the courts of the foreigner's home country. *Cf.* n.24 below.

RGZ 118, 80, 82, gives misleading reasons for the inapplicability of German trade mark

With this tendency, another rule, which is still to be found in the law of some countries, is connected. In these countries, the domestic laws against unfair competition are applicable to all acts committed within the country, but foreigners are either excluded from bringing actions on grounds of an infringement of these domestic laws, or they may do so only if reciprocity with their home country exists.[24] Most of these restrictions on foreigners' actions on grounds of unfair competition (which are not conflict of law rules, but form part of the law of aliens) have been eliminated by international conventions.[25]

But most interesting are the judicial decisions disregarding the *locus delicti* rule, and applying the domestic laws against unfair competition to injurious competitive acts committed abroad, if either one or both of the litigants are *nationals* or have their *domicile* in the country of the *forum*. This is motivated partly by the statement that the rules against unfair competition form part of the domestic *ordre public*,[26, 27] partly by the reason, that in some countries the provisions of *criminal* law against unfair competition are applicable also to acts of citizens committed abroad,[28] partly by the mere contention that the laws of a country against unfair competition must be applied to national business men carrying on a trade in a foreign country.[29] For a critical study of these

law to acts committed abroad, by contending "es könnte auch als Übergriff in die Rechtssphäre anderer souveräner Vertragsstaaten gedeutet werden, wenn ein Staat für Rechte, die er—wie das Zeichenrecht—für sein Gebiet geschaffen hat, Geltung in der ganzen Welt beanspruchen wollte." A country could not be said to violate the law of nations if its courts should protect the exclusive right of a person to certain acts of competition according to the laws of the domicile of that person; a country does not violate the law of nations if its courts try to protect other personal "rights" of a man even against infringements committed in a foreign country; in this connection *cf.* BGH 13.7.1954, n. 17 above.

[24] See §23 of the German Warenzeichengesetz and §28 of the German Gesetz über unlauteren Wettbewerb. In France and some other countries the courts have recourse to the idea of "droits civils," in order to refuse the application of the domestic rules against unfair competition in favor of foreign plaintiffs, *cf.* Roubier, Le droit de la propriété industrielle (Paris 1952) 598 ff.; Plaisant (n. 5 above) 467 ff., and the report on French law against unfair competition by Goré (n. 12 above).

[25] *Cf.* art. 2 and art. 10^{bis} par. 1 of the Paris Convention.

[26] *Cf.* OGH Wien 7.3.1933 (n. 23 above); C. App. Milano 8.7.1925, Rivista di Diritto Internazionale 18 (1926) 125; Trib. Com. Bruxelles 31.12.1952, J. Trib. 1953, 89.

[27] But it seems that rules forming part of the *ordre public* of the forum are to be applied only if the case has some connection with the country. Thus, OGH Wien 11.6.1930 (n. 2 above) applies the Austrian law against unfair competition to acts done outside Austria only because the injured plaintiff was an Austrian citizen.

[28] *Cf.* OGH Wien 7.3.1933 (n. 23 above). The question has been examined by Italian authors; in matters of unfair competition, *cf.* De Sanctis, Rivista di Diritto Internazionale 18 (1926) 130 ff.

[29] Thus, under the influence of Nussbaum, Internationales Privatrecht, (Berlin 1932), 339, some famous German decisions: RGZ 140, 125; RG 19.5.1933, Gewerblicher Rechtsschutz

reasons, it is not important whether such judicial decisions have been overruled in some countries[30] by more recent decisions referring again primarily to the *locus delicti*. The fact that even in the last year decisions can be found which apply the rules of unfair competition of the forum to nationals acting abroad seems to prove that in matters of unfair competition—as in other fields of tort—the *lex loci delicti* rule is not always convincing; such decisions are, therefore, a symptom of the crisis of the traditional conflict rule for torts, which has been indicated by Morris.[31]

That the *lex loci delicti* cannot always and exclusively be applied to actions for torts, is due to the fact that legal rules ordering or forbidding people to behave in such or such manner do not always order or forbid acts only within the respective country; if such rules are violated, neither can actions for damages be restricted to violations committed in the country. Many unlawful acts are followed by both private actions and criminal prosecutions; if such unlawful acts committed abroad are subject to a country's domestic penal laws (for instance if done by a national), it is hard to see why the consequences of the private law of that country should *not* be drawn.[32] It is relatively rare that the criminal law of a given country is to be applied to acts of unfair competition committed abroad by one of its subjects. In Germany §3 II of the Penal Code provides that the provisions of German penal law shall not be applied to acts committed abroad which are not punishable by the local foreign laws,

und Urheberrecht 38 (1933) 653; RG 28.9.1940, Gewerblicher Rechtsschutz und Urheberrecht 45 (1940) 564. RGZ 150, 271 seems to apply the German law against unfair competition to acts of German firms in a foreign market only if some element of the unfair competitive act has been committed in Germany. The same opinion seems to be held by the Bundesgerichtshof, see n. 17 above. In this decision the court is ready to apply principles of German trade mark law ("ungestörter Besitzstand") among German parties even in regard to *foreign* trade marks. The idea that domestic rules against unfair competition may be applied to domestic business firms competing abroad appears also in C. App. Milano 8.7.1925 (n. 26 above). In Steele v. Bulova Watch Co., 344 U.S. 280 (1952), the United States Supreme Court envisages the application of the Lanham Act to American parties doing business abroad. See also Branch vs. Federal Trade Commission, 141 Fed. (2d) 31 (1944): "The Federal Trade Commission does not assume to protect the petitioner's customers in Latin America. It seeks to protect the petitioner's competitors from his unfair practices, begun in the United States and consummated in Latin America. It seeks to protect foreign commerce. If that commerce was being defiled by a resident citizen of the United States to the disadvantage of other competing citizens of the United States, the United States had a power to protect such commerce from defilement, and a non-resident may look to his sovereign for protection."

[30] For the question if the German decisions cited above in n. 29 have been overruled, see the report on German law by Schwenn (n. 12 above).

[31] Morris, 12 Mod. L. Rev. (1949) 248 ff.; 64 Harv. L. Rev. (1951) 881 ff.

[32] *Cf.* n. 28 above. OGH Wien 11.6.1936 (n. 2 above) contends, however, that it is "Gemeingut der Lehre, dass die Frage, ob ein schuldhaftes Verhalten strafrechtlich verantwortlich macht, sich mit jener, ob und in welchem Umfange es zivilrechtliche Schadenersatzverpflichtungen erzeugt, für das Gebiet des internationalen Rechts nicht deckt." In the same sense Dubbink (*supra* n. 12) p. 28, against Kosters and others.

"if according to the sound view of the German people the act does not deserve of punishment because of the particular conditions at the place of commit ıent."[33] German writers on criminal law[34] contend that the German merchant must be free to comply with the rules prevailing abroad in regard to commercial competition in order to remain able to compete in a foreign market.

The application of the laws on unfair competition of the forum to citizens doing business abroad

Another idea mentioned by the courts and legal writers calls for closer examination; it is the contention that competition between *merchants of the same nationality* in a foreign country is still subject to the laws of their domestic country. Behind this rule lies the reasonable pretension that the legal rules of a country regulating the general behavior of people among themselves are binding also on small groups[35] of citizens or residents staying abroad but under conditions where they remain essentially related to their home country. Let us take the American school class spending their vacation at a secluded camp in the Canadian forests; or the family of the French visiting professor who is teaching in New York for a few months; or the German passengers sitting in a railroad car temporarily crossing Swiss territory at Schaffhausen. In spite of the old aged *lex loci delicti* rule, all these persons are generally not conscious that the legal duties to be careful towards each other, a breach of which would render them liable for damages, change upon passing from their own country into the foreign territory! Therefore, the *lex loci delicti* may be applied to them if they come into contact with people living in the country where they stay for a short time; but it is not unreasonable that tort actions among members of such groups—which are in a certain sense extraterritorial, so to speak,—should be judged according to the domestic laws of their common home country.[36] This rule, however, is in

[33] But see also §17 III of the German Gesetz über unlauteren Wettbewerb, and §20a of this law.

[34] *Cf.* Kohlrausch-Lange, Strafgesetzbuch mit Erläuterungen (Berlin 1950), p. 37.

[35] As the examples given in the text show, these groups need not be corporations or be otherwise legally organized; there is also no necessity of contractual relations between the members of the group.

[36] Where members of such group cannot behave according to different rules towards fellow-members and towards persons outside of the group, the relations between the members of the group must be under the same law applicable to relations between members of the group and persons outside of the group, i.e. the *lex loci delicti*; e.g., a member of the group mentioned in the text drives a car in the foreign country, his duty to be careful is the same towards natives and fellow-members of his group. The German Verordnung of Dec. 7, 1942, (RGBl I, 706), providing that all torts committed abroad between German citizens shall be exclusively subject to German laws, goes much too far.

most cases unworkable in the field of unfair competition, for the following reason: When the foreign competitors of two German merchants in a foreign market are subject to the liberal rules of that foreign market concerning competition, the competition between the two German merchants cannot be subject to the more rigorous German laws on unfair competition without prejudicing the two competitors in favor of their foreign business rivals.[37] Only when competitors of the same nationality are the sole competitors in a foreign market,[38] or when the competitive act forbidden by the laws of their domestic country could not possibly be done by the foreign competitors, domestic merchants competing abroad might be regarded as a secluded group, for the members of which the laws of their common home country concerning competition could be applied. If by the application of their domestic laws the merchants of a given country are not prejudiced in favor of the native competitors in a foreign country, the application of these domestic laws would appear feasible, provided that the legal rules of competition are still laws binding the merchants as members of a certain profession among themselves.

Are the rules against unfair competition rules for the members of a profession or are they rules for the regulation of a market?

This question deserves close examination. If some country were to regard its rules against unfair competition as rules for the members of a certain profession in this country, and if its courts would, consequently, apply these rules to the competitive acts done abroad by its subjects, the courts of this country would not be allowed to apply these domestic provisions to the competitive acts done by foreign merchants within the country; these persons, on the contrary, would be subject to the rules binding the merchants of their common home country. But nowhere can a decision in this sense be found, and I do not know of any legal writer asserting that the courts should so decide. So the conclusion seems justified that today the rules of unfair competition are nowhere qualified as rules for the members of a certain profession or class. It is true that a historical survey of the laws concerning unfair competition reveals that these rules have been formerly regarded as a merchants' code of honor, adopted as legal rules by statute, *cf.* the wording of art. 10bis of the

[37] This is pointed out by OGH Wien 11.6.1930 (n. 2 above), and by Raape, Internationales Privatrecht[3], (Berlin 1950), 367, with further references. See also Callmann, The law of unfair competition and trade marks, Chicago 1950, vol. 4, p. 2243.

[38] RG 18.1.1939 (n. 23 above) makes the existence of a true competitive relation between domestic merchants in a foreign market a condition for the application of German rules concerning unfair competition among them.

Paris Convention: "*usages honnêtes en matière industrielle ou commerciale.*"[38a] But when modern legislation has precisely defined the several acts of unlawful competition, it is submitted that this legislation protects other interests than the honor of the merchants; by providing rules against unfair competition the legislator intended not only to protect the interest of business competitors, but also those of the customers.[38b] The rules concerning indications of origin or misleading advertisements do certainly serve the interests of the honest competitor declining the use of such methods on his part, but primarily they protect the consumers. In other words, these legal provisions against unfair competition are to be qualified as *market regulations* ("*Marktrecht*"), and are not to be regarded any more as rules for and in the interest of the members of a certain profession or class ("*Standesrecht*"). As market regulations they are concerned with the competitive activities promoting directly a merchant's own sales, and they are supplemented by the legislation against "restraints of trade."[38c] Since antitrust legislation serves mainly as a consumers' protection, there was never room for an interpretation of antitrust legislation as a merchants' code of honor transformed into legal rules.

As antitrust legislation is always market regulation, it seems to be generally accepted that the antitrust laws of a given country are to be applied by its courts at any rate to all acts and agreements which have the effect of restraining the sales of other competitors within the domestic market,[39] regardless of whether the competitor is a subject of such coun-

[38a] In some European countries codes of honor are imposed on the members of certain professions by the official organizations of such professions, *e.g.*, of surgeons, *cf.* Mermillod, *loc. cit.*, p. 46 ff., and 102 ff. As for codes of honor in business generally see Mermillod, *loc. cit.*, pp. 50 ff., and 140. In the United States, codes of loyal practices have been elaborated by the "trade associations;" it is known that the effort of the New Deal policy to give them force as legal rules failed, *cf.* Schechter Poultry Corp. vs. United States, 295 U.S. 495 (1935).

[38b] *Cf.* General Baking Co. vs. Gorman, 3 Fed. (2d) 891 (1925); Scandinavia Belting Co. vs. Asbestos and Rubber Works, 257 Fed. 937 (1919); Taylor Distilling Co. vs. Food Center of St. Louis, 31 Fed. Supp. 460 (1940). The purpose of protecting the consumer remains in the background when a country has no specific rules against unfair competition, but applies only the general rules of its civil law regarding torts (e.g. those regarding libel and slander) to competitive acts.

[38c] In the minds of European lawyers, there is still a gap between the rules against unfair competition and the rules against trusts and monopolies, whereas in the United States all these rules are generally regarded as a whole, the rules against unfair competition aiming primarily at certain means, the rules against monopolies at certain effects of competition.

[39] According to U.S. v. Aluminum Co. of America, 148 Fed. (2d) 416, 443, (1945) the application of United States antitrust laws depends upon the fact that acts done outside the United States have consequences within the United States. (In the same sense, in effect, U.S. v. Sisal Sales Corp., 274 U.S. 268 (1927) and U.S. v. Imperial Chemical Industries, 100 Fed. Supp. 504 (1951).) In the Aluminum case, the court modifies the mentioned statement, however, by contending that the American antitrust legislation is not applicable if there are

try or a foreigner, and whether the single unlawful act is committed within the country or abroad. As a rule, it is not the intention of the antitrust legislator to protect the consumers of a foreign market. Application of the domestic antitrust laws in order to protect domestic export traders against restrictions on their selling activity on a foreign market might possibly be justified by the principle of "*ordre public*." But they are generally not enforceable against foreign competitors. Domestic export traders competing abroad may be successfully prevented from restraining each other's sales in the foreign market,[40] but one cannot—and actually does not—expect them to observe the domestic regulations[41] if they disturb the sales of *foreign competitors only*, and if they remain in accordance with the laws of the foreign market.

If in most industrial countries today the legal rules concerning unfair competition must be put on the same footing as the antitrust laws, because they are all rules for the regulation of the market, it seems reasonable to apply, primarily, the domestic laws concerning unfair competition to all those competitive acts having an effect *on the domestic market* of a country. If we accept this criterion, we have a good solution for the debated question, whether *locus delicti* is the place where an act has been committed, or the place where the damaging effects of the act occur.[42] The place where an act of competition is done is not relevant, but it is important on what market the act has influenced or might influence the

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mere "repercussions" of the limitation of the supply of goods in Europe on the American market. Haight, 63 Yale L.J. (1953/54) 639 ff., contends that these decisions are contrary to international law. On the question how foreign business firms may be brought before United States courts if their activities, outside the United States, but influencing the American market, are unlawful according to the American antitrust laws, *cf.* Wolf, 2 Rev. Int. D. Comp. (1950) 470 f.

[40] The Webb Act of the United States authorizes the Federal Trade Commission to control "unfair methods of competition used in the export trade against competitors in the export trade," even if "the acts constituting such unfair methods are done without the territorial jurisdiction of the United States" (U.S.C.A. Tit. 15 §64). Callmann, *loc. cit.*, vol. 4, p. 2001, recognizes that the jurisdiction of the Federal Trade Commission "is not similar to that of the courts under the rules of conflict of laws."

[41] In the United States antitrust jurisprudence, the question was inevitable as to what extent restraints of trade in a foreign market are subject to American law. U.S. v. U.S. Alkali Export Ass., 86 Fed. Supp. 59 (1949) speaks of the "exterritorial effect" of the antitrust laws; it points out, that the Webb Act withdraws its privileges as soon as they are being abused "in restraint of the *export* trade of any *domestic* competitor," and declares that the legislator had "a strong solicitude for those in this country who would be forced to compete with such associations abroad." U.S. v. National Lead Co., 332 U.S. 319 (1947) applies American antitrust laws to the participation of American corporations in foreign corporations, without examining the question, where the effects of the activities, which were declared unlawful, were realized.

[42] *Cf.* n. 14. above.

sales of other competitors.[43, 44] It must be admitted that the practical application of the criterion of the "effect on the sales on the domestic market" will meet with occasional difficulties, but the criterion has more sense than the traditional question as to the *locus delicti*. If a merchant simultaneously influences several markets by his acts, and if he is not able to adjust his competitive acts individually to the different markets—for instance because he advertises in a paper distributed and read in several countries—he has to observe the rules of the most rigorous of the different laws[44a] if he wants to avoid any conflict with the law of one of

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[43] Tendencies in this sense are to be found in those decisions where the "place of effect" is regarded as the *locus delicti*, *cf.* RGZ 45, 145; 54, 414; 55, 199; C. App. Angers 15.12.1891, Clunet 1892, 1144; Trib. Civ. Bruxelles 6.5.1952, not published, cited in the report on Belgian law of van Bunnen (n. 12 above).

The tendency finds expression also in those decisions which apply a foreign law, which is applicable to the foreign act of the main defendant, to acts done in the country of the forum by assistants of the main defendant, *cf.* RGZ 45, 145, and those applying foreign law to acts done in the country of the forum but preparing only a competitive act done abroad (e.g., the use of a trade mark). *Cf.* also George W. Luft Co. v. Zande Cosmetic Co., 142 Fed. (2d) 536 (1944): where defendants had established right to trade-mark in foreign countries superior to rights of plaintiff, a court of equity could not enjoin initiation of acts in the United States which constituted no wrong to plaintiff in the country where they were to be consummated. Nor can the plaintiff "recover damages for acts in the United States resulting in a sale of merchandise in a foreign country under a mark to which the defendant has established, over the plaintiff's opposition, a legal right of use in that country." But "where both plaintiff and defendants were doing business in foreign countries and defendants had not established right superior to plaintiff in trade-mark in the foreign countries, activities in the United States which would be consummated in those countries would constitute an infringement of plaintiff's registered trade-mark."

[44] At present the prevailing opinion is, however, that acts done entirely or partly in a given country are subject to the laws of that country, even if there is proof that they had no effect in the *domestic market*; so for the use of German trade marks RGZ 108, 8; 110, 176; RG 19.9.1933, Gewerblicher Rechtsschutz und Urheberrecht 1933, 847; RG 28.9.1940, *loc. cit.* 1940, 568; for the imitation of the outfit of merchandise RG 18.1. 1939 (n. 23 above). In the same sense, regarding the use of American trade marks, Hecker H-O Co., Inc. v. Holland Food Corp., 36 Fed. (2d) 767 (1929); regarding unfair competition: Vacuum Oil Co. v. Eagle Oil Co., 154 Fed. 867 (1907). See also Triangle Publications vs. New England Newspaper Pub. Co., 46 Fed. Supp. 198 (1942): Where the greater part of competition between parties took place in Massachusetts, Massachusetts courts would apply Massachusetts law "even if some part of the defendant's papers were sold in other states." The criterion of the effect on the market was rejected when proposed in order to delimit the scope of federal rules against unfair competition, *cf.* Federal Trade Commission vs. Bunte Brothers, 312 U.S. 349 (1941): The Commission may not proscribe unfair methods used in intrastate sales, when these result in a handicap to interstate competitors.

[44a] It should be noted that in the United States courts are reluctant to apply the law of more than one State to one competitive act having effects in several States (always provided that no federal law is applicable); Judge Wyzanski, National Fruit Product Co. vs. Dwinnel-Wright Co., 47 Fed. Supp. 499 (1942), believes "that the Massachusetts court has the robust common sense to avoid writing opinions and entering decrees adapted with academic nicety to the vagaries of 48 States." But would the same argument be good if the markets and laws

the countries whose markets he influences. It is, of course, possible, that the particular legal rules concerning unfair competition, e.g. rules concerning trade marks, establish "unrebuttable presumptions" that certain acts committed within a given country do influence the domestic market of that country; if such acts are committed in this country, any competitor will be entitled to an injunction of the court, regardless of whether he can prove that damage has been done to his business on the market of that country.[45]

The very reasons inhibiting the application of domestic antitrust laws to activities encroaching on the sales of business rivals in a foreign market do generally inhibit the application of the domestic market regulations to acts of unfair competition having effect in a foreign market as well. To apply the domestic rules to the competition between domestic merchants in a foreign market, is, as we have seen, dangerous for the merchants themselves; by the domestic legislation to influence a foreign market, namely, as far as the relations between domestic export traders competing abroad are concerned, would moreover contravene the principle that the domestic legislator of a country is competent to regulate competitive activities on the domestic market, but that it ought to leave the regulations concerning foreign markets to the respective foreign legislators, and refrain even from any partial regulation of a foreign market.

It is quite a different question, of course, whether a country is always able to compel a foreign competitor to comply with its rules concerning competition in the domestic market. Where a foreign producer or a foreign trader have more or less a monopoly for a certain article, and where consequently the domestic buyers are so dependent on the foreign sellers that these do not even need a local sales organization, there it may happen that the foreign sellers are out of the reach of the legal sanctions provided for an infringement of the domestic rules against unfair competition, even though these rules are theoretically applicable for the reason that the foreigners' competitive activities influence the domestic market. This difficulty is the same as that frequently occurring in the application of domestic antitrust laws, and actually it is essentially the same as the difficulty of applying a country's own *loci delicti* rule to foreigners. Therefore, the enforcement of judgments allowing damages, or

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of several sovereign states would be influenced by one competitive act? See also note, 60 Harv. L. Rev. 1319 ff.

[45] Schramm, Grundlagenforschung auf dem Gebiete des gewerblichen Rechtsschutzes und Urheberrechts, (Berlin 1954), proposes the place of infringement of a limited number of industrial property rights, but prefers to apply in all other cases the law of the market which has been disturbed by the act complained of, *cf.* p. 291 ff.

of injunctions of the court will be impossible if the person who has offended against a domestic rule concerning unfair competition has no assets within the country, though usually there will be money debts due by domestic buyers. In some countries, the courts have jurisdiction to grant an injunction only if the act to be prevented is done by the defendant himself within the territorial jurisdiction of the domestic courts; it is not sufficient that the defendant has property in the country which could be taken as a penalty. It is a country's own affair[46] if it hinders in such a way the enforcement of its own rules against unfair competition even if the acts of foreigners have an effect on the domestic market. Where the positive law concerning unfair competition allows the courts to take steps not only against the person profiting from the unlawful act himself, but also against anyone assisting him knowingly or not knowingly, there are, of course, increased possibilities to enforce the domestic rules against unfair competition on the domestic market.

Acts of unfair competition present themselves not only as unilateral activities of a trader (use of a trade mark, advertisements), but may also consist in contracts with third parties (contract with a servant enticed from a business rival's firm, contract with an advertising company); therefore, the legal sanction of rules declaring such acts unlawful may consist in the nullity of these contracts with third parties. In this case, the enforcement of the sanction depends on whether an action may be brought in a domestic court to declare the nullity of the contract.

The Application of Foreign Rules Against Unfair Competition

Can rules serving the economic policy of a country be applied in a foreign court?

By classifying the rules against unfair competition as market regulations, we also gain a new aspect of the question of the applicability of foreign rules against unfair competition. It was mentioned above that decisions applying foreign laws against unfair competition are rare.[47] In most cases, this can be explained by the fact that the injured competitor usually brings his action in a court of the country where he suffered damage by the decrease of his sales on the market, and that the courts of this country apply their domestic laws. If a merchant's activities in more than one foreign market are being encroached upon by one and the same act of his competitor, he is very likely to bring his action, especially that for an injunction of the court, in the courts of the country

[46] *Cf.* Dicey (-Wortley), Conflict of Laws[6], (London 1949); 193 f.
[47] *Cf.* n. 21 above.

applying the *lex fori* most favorable to him. But it seems that plaintiffs unconsciously hesitate to ask the courts of a given country to adjudicate acts which are unlawful *only* by *foreign* rules against unfair competition. If the protection afforded to the plaintiff by the foreign rules concerning competition is conceived as his exclusive personal *right* to perform certain acts of competition (e.g., use of a trade mark), the application of foreign laws may be more easily expected. But where foreign laws against unfair competition present themselves openly as market regulations, and where the foreign legislator by means of such regulations wants to influence the market in order to realize the objects of certain economic policies, the application of the foreign rules against unfair competition might be regarded as the enforcement of foreign *political* laws. In nearly all countries, courts predicate the somewhat vague principle that foreign penal and *political* laws should not be applied.[48] In many countries acts of unfair competition may be punished as a crime, and it seems that it makes no great difference if a country leaves it to the injured competitor himself—instead of or beside the public prosecutor—to bring actions against unfair business rivals; the plaintiff in such a case is the tool of and serves to realize the economic policies of the legislator. Therefore, the courts will hesitate to grant injunctions against acts said to be unfair competition if that would mean the enforcement of such rules dictated by a foreign legislator in order to promote his economic policies.[49] We are faced here with a dilemma quite familiar in other fields of the modern conflict of laws: On the one hand, the courts of every country are willing to apply the rules of foreign private law, since they regard the personal rights of individuals and other subjects of private law as deserving of protection even if founded on foreign law; on the other hand, all authorities of a state, including the courts, refuse to enforce political measures of foreign countries. We cannot discuss the problem here as a whole. In the field of unfair competition, this dilemma would probably be best overcome if the countries agree on a minimum of positive rules against unfair competition, either expressly or by actual usage; there is a beginning of such agreement in art. 10^{bis} of the Paris Convention. If such a minimum of rules against unfair competition were agreed upon, there would be no difficulty in regarding such rules as genuine and un-

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[48] *Cf.* the report of Arminjon, 43 Annuaire de l'Institut de droit international (1950) II, 1 ff, which cannot be approved entirely; Gihl, 83 Rec. Cours Acad. D. Int. (1953 II) 167 ff.

[49] Provisions of this kind, for instance, are the German Rabattgesetz of Nov. 25, 1933, and the German police regulation concerning the advertisements of the pharmaceutical industry of Sept. 29, 1941. Foreign antitrust laws are not applied by Trib. Civ. Milano 12.3.1927, Clunet 1928, 213. Steindorff, NJW 1954, 374 ff., has no objection to the application of foreign antitrust laws.

political *private* law, or to grant judicial assistance to foreign countries, because the goals of the policies, which the rules serve, are the same in all countries.

Cumulative application of laws against unfair competition from several countries

Where the national laws against unfair competition are not internationally uniform, the application of foreign rules does not only meet the general disinclination towards enforcing foreign political measures, but there are also other difficulties. Let us suppose that the spheres of application of the different national laws concerning competition were determined in such a way that each country is competent to make rules against unfair competition for such acts as have effects on the domestic market, there would still be the question what law should be applied if a competitive act influences several markets at a time—as for instance the advertisement in a paper read in several countries by the prospective customers. We are faced here with a problem similar to that arising when "*lex loci delicti*" is to be applied to actions for unfair competition, and when one act is done successively in several countries. Should it be contended, in this case, that the merchant is bound to observe the most rigorous of the national laws, and that it is at the plaintiff's choice to refer to the—domestic or foreign—law most advantageous to him? A cumulation of legal rules from different countries prohibiting or restricting certain human acts is actually realizable.[50] The cumulative application of several countries' rules concerning competition appears essentially feasible except where the competitive act *prohibited* in one country is conceived as a personal *right* in the next. Certainly, the mere fact that a certain competitive act is not expressly prohibited by the law of a given country does not by itself sufficiently justify the interpretation that every competitor in the domestic market has a personal "right" to perform this act. But if a certain act is expressly prohibited in one country and expressly permitted in the next, a conflict arises between the personal right to perform the act, granted by one judicial system, and the personal right to an injunction against this act, granted by an other judicial system. The owner of a trade mark which for some reason is valid only in one country, may use his trade mark in advertisements in this country, and this advertising may influence a foreign market where another person has the exclusive right to use the same trade mark. If the simultaneous applicability of both legislations is founded on the identical

[50] OGH Wien 7.3.1933 (n. 23 above) seems to cumulate the *lex loci delicti* and the common national law of the parties.

criterion—influence upon the market—and if the *lex fori* is involved in the conflict, the *lex fori* will in case of doubt be stronger than any foreign rule, regardless of whether it contains a prohibition or a permission.[51, 52] If a conflict of this kind arises between the laws of several foreign countries, the forum may be expected to prefer the rule most similar to that of the domestic legal system.

The relevance of the sphere of application of foreign laws as determined by the foreign conflict rules

Let us suppose that the application of a foreign rule against unfair competition is inhibited neither by its political character nor by con-

[51] The courts met the same problem when one competitive act extended to several *loci delicti*. Thus, it was held in RGZ 118, 76, that the owner of a German trade mark might not be prevented from using it in Germany, even if that act 'sich in der Folge als Beihilfehandlung zu einer von einer dritten Person im Ausland begangenen Verletzung einer ausländischen Marke herausstellt." *Cf.* also RG 28.9.1940 (n. 29 above), and RGZ 55, 199. Furthermore, see C. App. Angers 15.2.1891 (n. 43 above), and Margarethe Steiff Inc. v. Bing, 215 Fed. 204. (1914).

[52] If there is a conflict between the prohibition of a certain act according to one law and the right to perform this act according to the other law, and if both laws be applied by virtue of *different* conflict rules of the forum, it is not absolutely necessary to prefer the *lex fori*. For some time the Reichsgericht used to regard the trade mark of a German owner as an intangible personal right (*Persönlichkeitsrecht*), which was to be respected according to German law even outside of Germany; yet, when another person was entitled to the use of the same trade mark in a foreign country, according to the respective *lex loci*, the Reichsgericht applied the foreign law, and therewith preferred the permission provided by the law of the place of commitment to the prohibition provided by the national law of the parties:

"Dem vom Oberlandesgericht aufgestellten Rechtssatze ist beizutreten, dass, wenn dasselbe Warenzeichen in Deutschland und im Auslande verschiedenen Personen für dieselbe oder gleichartige Ware geschützt ist, die Rechtsordnungen zweier selbständiger Länder einander gegenüberstehen, daher das Inland die Ausübung des ausländischen Rechts im Auslande nicht als einen Eingriff in sein Recht ansehen dürfe. Die Verbotsklage setzt einen objektiv widerrechtlichen Eingriff in das Zeichenrecht voraus. Ist derjenige, welcher den angeblichen Eingriff im Auslande verübt hat, nach dem Rechte des ausländischen Staates der zum Gebrauch des Zeichens ausschliesslich Berechtigte, so handelt er nicht widerrechtlich, die Ausübung eines gesetzlich anerkannten Rechtes kann nicht einen Eingriff in ein fremdes Recht darstellen. Allerdings trifft dieses, wie der Revisionsklägerin zuzugeben ist, nur, wenn der Eingriff, um den es sich handelt, in dem betreffenden Auslande stattfindet, nicht aber, wenn er im Inlande oder sowohl im Inlande als auch im Auslande begangen ist," RGZ 45, 145.

A similar result is reached by George W. Luft Co., v. Zande Cosmetic Co. (n. 43 above). BGH 13.7.1954 (n. 17 above) contends that the German owner of a trade mark registered in a foreign country may object in a German court to the use of a German trade mark in the foreign market, which has been secured later than the foreign trade mark by another German party. But according to this decision, "jeder in Deutschland ansässige Wettbewerber, der über solche konkurrierenden ausländischen Schutzrechte verfügt, ist in der Handhabung dieser Rechte *in Deutschland* an deutsche Rechtssätze gebunden." Therefore, if the owner of the older foreign trade mark had for some time tolerated the use of a younger German trade mark in the foreign market, the owner of the older trade mark would be estopped according to the principles of *German* law to prevent the use of this younger trade mark. The application of German estoppel principles shall, however, take place only if both parties have their commercial domicile in Germany.

tradictory provisions from other judicial systems which are also applicable, then one should still consult the conflict rules of the foreign country, because a foreign prohibitive rule should not be given a territorial sphere of application which is greater than it has according to the law of its country of origin.[52a] Thus, if the law of a country would ask its courts to apply some of its rules against unfair competition only to the sale of domestic products in the domestic market, but not to the sale of foreign products in the domestic market, this restriction would have to be observed when the laws of this country would be applied in a foreign country. Nor would a foreign *lex loci delicti* be applied to nationals of another country if the *lex loci delicti* itself does not seek to be applied to them.

On the other hand, if rules against unfair competition of a given foreign country are intended to influence markets of other countries besides the domestic market of that foreign country, other countries will not follow them. A contrary opinion has been expressed for the antitrust laws. It has been contended that the European courts are held to respect that, according to the conflict rules of the United States the antitrust laws of this country apply not only to restraint of trade in the domestic market —more exactly, in the interstate commerce of the United States—and not only to restraints of trade in the import trade, but also in the *export trade* of the United States.[53] I doubt that courts in European countries will follow this proposition. If an action would be brought before a non-American court by a non-American merchant against another non-American merchant for unlawful restraint of trade, it may be that the court will apply the American rules if the acts complained against have their effect on the American market—provided always that the American antitrust laws are not regarded as political laws which cannot be enforced abroad.[54] It is possible, however, that the same acts which are prohibited by the laws of the United States are lawful according to a foreign law. If, according to a foreign law, agreements of commercial groups to restrain the competition of business rivals outside of these groups are valid and binding, and if such foreign law must be applied by a foreign court as the proper law of the contract to an agreement of this kind, the question will arise whether the agreement is to be regarded as a

[52a] The principle enunciated in the text is, obviously, not valid for rules which do not consist in a prohibition of an act, i.e., in an encroachment on individual freedom.

[53] *Cf.* Kronstein, Festschrift für Martin Wolff, (Tübingen 1952), p. 240 ff.

[54] Steindorff (n. 49 above) would apply foreign antitrust laws whenever they are *leges loci delicti*, but meets with "major difficulties in determining the place of commission." (Why place of commission only?)

contract to commit an "unlawful" act, if the agreement provides for the commission of acts which are crimes or wrongs according to the law of the place of performance, viz. the United States. But this does not mean that the non-American court has to disregard completely the contractual obligations according to the proper law of the contract, and that it has to shape a tort rule after the pattern of the American tort rule,[55] wherever the American law undertakes to prohibit some act within *or even without* the United States, or where an American court orders non-American parties to perform acts (e.g. the alienation of patents) without the United States as a remedy for the violation of its antitrust laws. If a country tries to impose its principles regarding restraint of trade on a foreign market, and to apply them to its own citizens,[56] or even—because they are regarded as principles of its *ordre public*[57]—to foreigners, this alone is no sufficient reason for the courts of other countries to apply these rules to the same extent.[58] It is known that the American antitrust legislator has tried to missionize in other countries, though it may be doubted whether the conditions prevailing there justify the introduction of rules which are absolutely identical to those of the United States. It is a disguised support of these missionary tendencies, if courts of other countries are invited to manipulate their conflict of law rules in order to promote the application of American antitrust laws.

The same considerations are valid regarding the rules against unfair competition. Rules of a foreign country which are intended to influence the activities in the markets of other countries cannot be applied by the courts of these countries, even between citizens of that foreign country, and even if the court would be convinced that the foreign rules are better than those of the *lex fori*. Thus, it may well be that some countries will apply their domestic rules against unfair competition to their export trade as well as to their domestic trade and their import trade, but other countries have no reason to do the same and to support such an extension of the sphere of application of the foreign laws.

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[55] It seems to me that this is the argument of Kronstein, *loc. cit.* (n. 53 above).

[56] *Cf.* Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951); see also Bergson, "Manufacture Abroad and the Sherman Act," in: Lectures on Federal Antitrust Laws, (Ann Arbor 1953), 213 ff.

[57] See Kronstein (n. 53 above), p. 244: "Die Wirtschaftsordnungen, ob aus Gründen des Krieges oder der Währungsprobleme, oder aus Gründen einer zielhaften Planung, verlangen eine absolute Einordnung jeder Wirtschaftstransaktion in die eigene gesetzliche Ordnung. In jedem einzelnen Falle muss der Tatbestand im Gesamtlicht der eigenen Ordnung und der Beteiligung der eigenen Ordnung an der internationalen Wirtschaftsordnung gesehen werden. In jedem einzelnen Falle muss untersucht werden, ob das Ergebnis der von uns akzeptierten Ordnungsidee und Gerechtigkeitsvorstellung entspricht."

[58] See British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd., (1952) 2 All E.R. 780, and (1954) 3 All E.R. 88.

NORMAN S. MARSH

Supranational Planning Authorities and Private Law[1]

An English Approach to a New Aspect of Comparative Law

ANY DISCUSSION OF THE LEGAL IMPLICATIONS of the activities of supranational planning authorities by an English lawyer is subject to considerable difficulties, partly theoretical and partly practical.

To appreciate the theoretical difficulties, it is first necessary to define the meaning of the term "supranational." It is to be contrasted with the term "international." An international authority may have some indirect effect on private legal relations; it may have taken over some part of the sovereignty of national states. But its essential characteristic is that it can only operate as between governments, at least as far as the direct legal effects of its decisions are concerned. Even the International Labour Organisation, which as Judge Lauterpacht has pointed out[2], "embodies features which in several ways signify a departure from traditional forms of international organisation and from accepted doctrines of International Law," is only an international authority. A convention which has been passed by the necessary two-thirds majority requires the ratification of each member-state, before it binds that state; and even when a state has ratified a convention its citizens would not be affected in their private legal relations until such relations had been adjusted by legislative action on the part of the state parliament. A supranational authority, on the other hand, acts within its sphere of jurisdiction directly on the private citizens of the states subject to the authority.

The Treaty establishing the European Coal and Steel Community, for example, gives the High Authority wide power to regulate the production and marketing of coal and steel in the territory of the member-states under the ultimate sanction of fines and penalties which may be directly enforced by the Community in the national courts of these

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[1] An amended version of a lecture given in Munich in July, 1954, at a Conference on "Legal Aspects of European Co-operation," organized by the German National Committee of Comparative Law.

[2] Oppenheim, International Law, Vol. I, 7th ed. p. 662.

member-states.[3] In other words, within the territory of the member-states two systems of law have to be reorganized and harmonized, the one the traditional national system, the other imposed by the supranational authority.[4]

Herein lies the peculiar theoretical difficulty of the English lawyer. Lacking an opportunity to study the effect of a supranational authority in his own legal system, he turns naturally to what appear to be analogous situations. Cannot, he asks, a supranational authority such as the European Coal and Steel Community be compared to the English minister or other authority putting into effect by means of orders and regulations principles of economic planning laid down in general terms in an act of Parliament? For example, under the Monopolies and Restrictive Practices Act, 1948, any one of nine named ministers has power to make orders dealing with "conditions to which the Act applies;" such conditions have to be found to exist by the Monopolies Commission, set up under the Act, and declared to be against the public interest either by the Commission itself or by resolution of the House of Commons.[5] The "conditions to which the Act applies" are explained in the Act to mean situations in which the supply or processing of goods is, as to at least one third of the total dealt with, either in the hands of one person or of a number of persons linked by agreements or arrangements restricting competition.[6] There are obviously some close similarities here to the articles of the treaty constituting the European Coal and Steel Community which set out[7] the objects of the Community and give the High Authority power to make decisions[8] in accordance with those objects.

The differences, however, are more striking than the similarities. It is very misleading to compare, without many reservations which tend to detract from the value of the comparison, the impact of a supranational system of law on a number of national legal systems with the clash between the economic legislation, whether direct or delegated, and the ordinary law of a single system. In dealing with supranational legislation, we are not entitled to assume that it presupposes a basis of principle drawn exclusively from any one legal system; this remains true even if, in deal-

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[3] Article 92 of the Treaty establishing the European Coal & Steel Community.

[4] Somewhat different considerations must necessarily apply to a lawyer working in a federal system, such as the United States, who is familiar with the co-existence of two systems of law. On the other hand both federal and state law share in all the states except Louisiana a common-law basis, a fact which *mutatis mutandis* may make at least some of the difficulties mentioned in the first part of this article understandable to United States lawyers.

[5] s. 10 and s. 20 (1) of the Act.

[6] ss 3 and 4 of the Act. The export trade is especially dealt with in s. 5.

[7] Articles 2 to 5.

[8] Article 14 and Title 3 of the Treaty, articles 46–75.

ing with the European Coal and Steel Community, it is clear that the draftsmen of the Treaty have drawn heavily from principles of French administrative law. On the other hand, if we are dealing with English law, for example, the interpretation of a particular statute or of the scope of powers given under a statute will be influenced by various rules or presumptions which the common law has developed in the interpretation of statutes. Admittedly, the alleged bias of the English judges in interpreting legislation, and particularly economic and social legislation, has been in recent years strongly criticized, notably by Professor Friedmann[9]; but within one national system of law the judges are entitled to assume that Parliament starts from the basis of the common law and that therefore it will normally state specifically what changes it wishes to make in that system.

In a recent case,[10] for example, the Court of Appeal had to decide what was the effect of the National Health Service Act, 1946, on a promise by a doctor in a medical partnership, on leaving the partnership, not to compete with his former partners in the area covered by their joint practice. The National Health Service Act, 1946, set up a national medical service, gave powers to a Medical Practices Committee to permit, or to refuse permission to, doctors to practice in a certain area, made the sale of the goodwill of a practice illegal and compensated then practising doctors for the loss of goodwill as a commercial asset.[11] In the case before the Court of Appeal, the question was whether the promise not to compete could be enforced, that is to say whether the goodwill could be protected, although it was no longer a saleable object. It is fairly certain that if the court had had no background of common law tradition in this matter, it would have been forced to the conclusion that the underlying purpose of the Act was to abolish altogether the concept of a medical practice as an item of private property. It would have been possible for the Court of Appeal to accept this point of view as the general rule but in the particular case to enforce the agreement by relying on special provisions affecting partnerships in existence when the Act came into force. But the Court in enforcing the agreement put its decision on the wide ground that the common law as it existed before the Act must first be considered and, if the plaintiff would then have had a remedy, nothing in the Act had taken it away. It could have been argued that the control which the Medical Practices Committee was to exercise over practitioners was intended to check competition by public supervision rather than by private

[9] See Law and Social Change, Ch. II.
[10] Whitehill v. Bradford [1952] Ch. 236. Note by G. H. Treitel in 15 Mod L.R. 364.
[11] S.33–36 of the Act.

agreements, but the Court in effect took the view that both methods of checking competition were desirable. This decision has not passed without criticism in England,[12] but it serves to illustrate, although in a somewhat exaggerated form, the difference of approach between English lawyers, dealing with national legislation, whether direct or delegated, and that which must be adopted by lawyers who are called upon to consider the effect on their national systems of measures of control by a supranational authority.

The practical difficulties which beset the English lawyer in a discussion of this topic is the dearth of readily available literature on supranational authorities. In 1943 in an article[13] of considerable foresight, Professor Friedmann gave an outline of some of the problems which would be likely to beset the international public corporations of the future. The difficulties which he foresaw were mainly concerned with the law to be applied to the land, the torts, and the contracts of the corporation itself; he argued that these difficulties could be solved only by an international court. We may perhaps be permitted to add that the difficulty which is the central theme of this discussion, namely the effect of the supranational public corporation on the private legal relations of others, would equally seem to require the ultimate co-ordinating influence of a single international court. In this connection, it is noteworthy that under the Treaty constituting the Coal and Steel Community, the court thereby set up has not got exclusive jurisdiction with regard to the interpretation of the Treaty, except—and the exception is of course of vital importance—with regard to agreements or decisions which hinder free competition (art. 65, s. 4 II). Dr. Heinrich Matthies, in a recent article,[14] has suggested that it would be highly desirable if the member-states made use of art. 43 II and passed national laws making the court of the Community the final instance in all matters concerning the subject matter of the treaty.

Apart, however, from Professor Friedmann's article, which of necessity was only a sketch of the hypothetical problems of a supranational authority, other writers in English have so far been of little help. The title of a lecture delivered by Professor F. H. Lawson in 1949, "Private Law Aspects of Western Union,"[15] appears interesting, but on closer examination it becomes clear that his thesis, namely that unification of private law may or may not be a necessary or at least desirable adjunct of political union, only touches the fringe of our particular problem. He points out

[12] See Treitel, *supra*, n. 10.

[13] 6 Mod. L. R. 204.

[14] Juristenzeitung, 1954, p. 307.

[15] Current Legal Problems, 1949, p. 226.

that although differing systems of private law may exist inside one political union—the union of England and Scotland is an obvious example—some branches of law, commercial law in particular, could with advantage be unified. In the present discussion, however, the issue is not whether or not to unify a particular branch of law, but what are the effects of a unified portion of the law on the remaining parts of the various national legal systems. Nevertheless, Professor Lawson's discussion of the way in which private international law might be unified may be noted in passing, as the method which he favors is closely similar to that envisaged, although not fully worked out, with regard to the law concerned with the European Coal and Steel Community. Borrowing from the practice of the Court of Session in Scotland and from that of the *Cour de Cassation* in France, he suggests that where a particular point is being differently decided in different countries, it might be referred by the Court, where the point is in issue, to a permanent committee representing all the highest courts of the Union. Mention has already been made of the possibility under article 43 of the treaty constituting the Coal and Steel Community for member-states to give the Court of the Community exclusive jurisdiction in all questions of law concerning the community, but perhaps in Professor Lawson's paper we may see a hint of an alternative method of unification. There are obviously serious practical objections to piling on the court of an international authority a great mass of cases of varying importance; and an English lawyer, conscious of the large measure of unification within his own system, which is made possible by informal exchanges between the judges outside the courts, may be forgiven for at least asking to what extent such exchanges may be possible in the European field perhaps through a standing committee of judges of member states of the supranational authority.

Most of the discussion in England and America of the European Community for Coal and Steel[16] may be classified under three headings; descriptions of its constitution, discussion of its status in international law, and consideration of its economic implications, none of which bear directly on the main theme of this paper. Mention must be made, however, of an article by Mr. Vernon of the United States State Department[17] which, although mainly descriptive, attempts to answer a question, which is

[16] See L. C. Green, "Legal Aspects of the Schuman plan," Current Legal Problems 1952, p. 274; E. van Raelte, "The Treaty constituting the European Coal & Steel Community," 1 Int. C.L.Q. 4th ser. (1952) 73; Raymond Vernon, "The Schuman Plan," 47 Am. J.I.L. (1953) 183; Zawadzki, "The Economics of the Schuman Plan," 5 Oxford Economic Papers (NS) (1953) 157.

[17] See n. 16 *supra*.

certainly closely connected with the impact of the law of the Community on national systems of law. This is put in the following way: "What is the general animus with which the Community is expected to administer these powers?" This, Mr. Vernon continues, is another way of raising the issue whether the spirit of the community is that of a "free enterprise" state such as the United States or Canada, or a government-regulated state such as the United Kingdom and Norway during the latter 1940's, or a state regulated by private industry such as Germany or Japan in the early 1930's. Whether these generalized descriptions are accurate—Mr. Vernon himself admits that they are only approximately true—is for our purpose unimportant, but the answer which he gives to his question is interesting. He considers that art. 65.1., para. 1, of the Treaty (which prohibits agreements, group decisions, or concerted practices tending to influence prices, control production; or allocate markets, products, customers, or sources of supply) is much closer in spirit to the United States Sherman Act than to the doctrine, which some European commentators on cartels have favored, namely that "bad cartels" are illegal and "good cartels" are permissible or even desirable. Mr. Vernon further says that the provisions of article 66 of the treaty (which prohibits without permission of the High Authority mergers of enterprises under the jurisdiction of the Community) go further than any measures of general application in American law. It may be added that they go much further than the already mentioned English Monopolies and Restrictive Practices Act of 1948. In that Act it is not sufficient that conditions of monopoly or potential monopoly exist in order to enable measures to be taken against them: such monopoly must be found to be against the public interest—that is, in Mr. Vernon's language it must be a "bad" monopoly as opposed to a "good" monopoly. Although lawyers however, are not usually called upon directly to argue for or against a particular economic policy, in relation to a supranational authority such as the European Coal and Steel Community it is necessary to determine the economic assumptions of the constitutive treaty in order to interpret its terms and to estimate its effect on national systems. If, for example, Mr. Vernon is correct in his estimate, it is strongly arguable that, apart altogether from the express provisions of art. 65 s.4, an agreement which offended against art. 66 (prohibiting mergers without permission of the High Authority) would be void in private law, as being against the general policy laid down by the Treaty. Here there is clearly room for a difference of opinion, and it can be argued on the other side that as the Treaty specifically lays down that the Community shall "accomplish its mission—with limited direct intervention," the immediate nullity of private law transactions

must not be assumed unless specifically laid down. Further, it could be said that as by art. 66, s. 5, para. 5, of the Treaty, the High Authority has power to rescind a merger, it must be assumed that, at all events by private law, it remains valid until the intervention of the High Authority.

No doubt the main reason why there has been comparatively little discussion in England or in America about the impact of the legislation and orders of supranational authorities on private law is simply the lack of a practical necessity to consider the problem. But there is a deeper reason, which is bound up with the characteristically common law method of regarding the legal process. A lawyer in the common law countries is, in the first place, concerned to see that there is a tribunal competent to settle the question; in the second place, he asks whether there are any special laws or cases to guide the tribunal, but he is generally unwilling to consider in the abstract the application of these laws or cases to the solution of hypothetical problems. Making all due allowance for the difference between the measures of a national and a supranational authority, it may however be asked whether the British experience of a planned economy has not raised interesting questions concerning the clash between planning measures and private legal relations. The question may be answered affirmatively, but here too there is the practical difficulty of finding adequate discussion based on general principles. From the outside, it may appear that at least in the 1940's the United Kingdom has been pursuing by means of a wide range of direct and delegated legislation a carefully concerted policy of economic and social planning.[18] From the inside, the picture is more confusing. The conception of a "planning measure" cannot be considered in the abstract; it must be related to a particular act or order. Furthermore, apart from the denationalisation measures (Transport and Iron & Steel) of the government, elected in 1951, there has been for some years a steady relaxation of controls imposed under the authority of wartime legislation. Over the greater part of the national economy, there is, for example, now no price control by government

[18] Among the more important industries which have been nationalized, through the setting up of a public corporation with monopoly powers, which (as in the case of air transport) may sometimes be relaxed in favor of a limited measure of private exploitation, are the following: coal (Coal Industry Nationalisation Act, 1946); electricity (Electricity Act, 1946); surface transport (Transport Act, 1947); iron and steel (Iron and Steel Act 1949); air travel (Air Corporations Act, 1949). But road transport and iron and steel have since been denationalized (Acts of 1953). Other fields in which economic planning by parliamentary act or governmental order may be found are: location of industry (Distribution of Industry Act, 1945, and Town and Country Planning Act, 1947); use of land (Town and Country Planning Act, 1947, which, however, has been narrowed in scope by an Act of 1953); monopoly (Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948; exploitation of inventions and patents (Development of Inventions Act, 1948, and Patents and Designs Act, 1949.)

authority. It may therefore be misleading to make generalisations from the decisions of courts on the effect of powers which although exercised after the war belong in spirit to the wartime emergency.

The case of *Howell v. Falmouth Boat Construction Co. Ltd.*,[19] which came before the House of Lords in 1951 is typical. In that case what was in issue was the validity of a ship-repairing contract, at a time when according to a government regulation such work required a *written* license. The work done, for which payment was being sought in the action, had in fact been *orally* licensed by an official and was *retrospectively* licensed in writing. Could the ship-repairer sue for the work which he had done? One eminent academic writer[20] has argued, in support of Lord Justice Denning's judgement in the Court of Appeal, that any act done on the authority of a responsible government official, which is in fact illegal, although it appears to be legal, should be treated as if it were legal, from the point of view of both criminal and civil law. The House of Lords did not accept this view and what is here important to emphasize refused to see more in the problem than deciding whether the work done had been orally licensed, whether it had been subsequently confirmed by a written license and, finally and most important, whether according to the particular order in question, the written license could be construed retrospectively. In other words, everything was made to depend on the particular order, a defensible point of view but one discouraging to academic speculation and generalization.

One notable exception to the general unwillingness of legal writers to consider the impact of planning measures on private legal relations is Professor Friedmann's book on *Law and Social Change*, published in 1951. As a source of material and for stimulating suggestions, it is an invaluable work and one which has been of greatest assistance in the preparation of this article. On the other hand, Professor Friedmann exaggerates the extent to which a common trend may be seen in the individual decisions.[21] It is perhaps therefore a dangerous work for comparative purposes, as it may suggest that English law can contribute more to the wider problem of the effect of planning measures of supranational authorities on private law than the actual state of English law would justify.

English law has not in fact worked out and applied a clear and consistent policy to the problems raised by a planned economy. In an extremely interesting and recent work[22] M. Malaurie has pointed out that

[19] [1951] A.C. 837.

[20] Professor Glanville Williams in 15 Mod. L.R. 69.

[21] See the review of Professor Friedmann's book by Professor Hart in 70 L.Q.R. 115.

[22] L'Ordre Public et le Contrat (Étude de Droit civil comparé. France, Angleterre, U.R.S.S.) Tome premier, Éditions Matot-Braine, Reims, 1953.

in all countries, which are not totalitarian, there is an inevitable tension between what he calls "static public policy" and "dynamic public policy." The latter is the ideal of the legislature; the former of the judiciary. The English judge, in particular, is unwilling to discuss the ideological foundations of the law, especially in their economic aspects. The economic assumptions of a legal system cannot be discovered merely by looking into the past, which is what the judge by training is inclined to do. The English judge therefore, when faced with a legislative act interfering to some extent with normal economic relations between individuals, established by private law, generally turns to the particular source of legislative authority and if this is equivocal falls back on the principles of "static public policy." It is not necessary to defend this attitude, but only to draw attention to its existence. It may indeed be an entirely inappropriate attitude for the judiciary to adopt in countries subjected as far as a certain part of their economy is concerned to a supranational authority. If this is true, the comparative material on English law which is considered in the second part of this article may serve as much as a warning as an example.

II

Measures of economic and social planning in England make contact and clash with the established principles of private law at many points. Discussion is here limited, however, to issues which offer useful comparisons with foreign law and, in particular, with the problems which arise in co-ordinating the orders of a supranational planning authority, such as the European Coal and Steel Community, and the law of the member-states.

1. Well-established Powers Relating to Transport

No sharp division exists in the English legal system either *de jure* or *de facto* between ordinary legislation, direct or indirect, and measures of economic planning, whether imposed directly by an act of parliament or indirectly by governmental order or regulation. The clash therefore between the policy of a legislative act and the hitherto accepted principles of the common law is not necessarily a new one. Indeed at a very early date, the common law itself in some cases incorporated principles which cannot easily be reconciled with other well-recognized doctrines of the common law. For example, a common carrier was liable in tort at common law if he refused to accept a load, a liability which clearly conflicts with the general requirements of the common law as to the consensual character of contract. In *Crouch v. L.N.W. Railway Co.*[23] in 1854 it was held

[23] 14 C. B. 255.

that the railway company was liable in damages for refusing to carry the plaintiff's parcels. A statute of 1854[24] compelled railway and canal companies to offer reasonable facilities for goods and passengers and this power of compulsion has been preserved in the Transport Act, 1947.[25] But the remedy of the aggrieved party, who is refused facilities, is not in the common law courts but before a transport tribunal. There is a considerable body of case-law on what are and what are not reasonable facilities[26]. The usual procedure is for the transport tribunal to order the railway authority to provide proper facilities without specifying the particular measures to be taken. Similar powers are given to the transport tribunal to prevent the railway authorities from offering undue preference to one class of customers[27]. It seems clear that a contract made with a railway authority which is negotiated at a time when the facilities, as later found by the transport tribunal, are "unreasonable," would be valid in the ordinary courts. If the contract as made showed either an undue preference to the other party or by comparison with other contracts an undue discrimination against him it would equally be valid. But the party would have the right to obtain damages from the railway authority before the transport tribunal to the amount of preference shown to other persons[28]; he can also ask the tribunal to fix an exceptional rate for his own traffic equal to that granted to the goods with which he is competing[29].

When we consider this well-established branch of English law in relation to the régime established by the European Coal and Steel Community, certain features of the English system appear especially noteworthy:

(a) The ordinary courts are not called upon to recognize in the first instance any alteration in the ordinary principles of contract affecting railway transport.

(b) A special tribunal has the power, directly under the authority of statute, to force a contract on the railway authority.

(c) A party aggrieved by a failure to comply with the statute has not got a general remedy by the common law but a special statutory remedy before the tribunal.

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[24] Railway and Canal Traffic Act, 1854, s 2.

[25] S. 75.

[26] See Kahn-Freund, Inland Transport, 2nd ed., 1949, pp. 101–107.

[27] Railway & Canal Traffic Act, 1854, s. 2.

[28] An attempt to recover the excess of charge in the ordinary courts failed in L & Y Railway Co. v. Greenwood, (1888) 21 Q.B.D. 215. The power to obtain damages before the Transport Tribunal is given by the Railway & Canal Traffic Act 1888, s. 12 & 13.

[29] Railways Act, 1921, s. 37 (3).

(d) In general—and this seems important in relation to a discussion of the European Coal and Steel Community—the avoidance of any difficult problems as to the common law is achieved by the provision of remedies for private individuals before a special tribunal.

2. Price-Regulation

The effect on English private law transactions of price regulations, which have been generally promulgated under the authority of wartime legislation reserved beyond the war-period,[30] has been imperfectly worked out. There are far fewer helpful decisions than might be expected. It seems generally assumed that a sale at more than the permitted price is void.[31] Unless the relevant legislation specifically so orders, the sale is not valid at the permitted price. The courts will not take it upon themselves to imply agreement to sell at the lower price, when no such consent can in fact be found. A statute may however directly validate the sale at the lower price. There does not appear to be any sale of goods which is so affected by statute, but an analogous case is that of an agreement for a rent-restricted house at a rent higher than is permitted. The agreement is valid at the controlled rent and sums paid in excess can be recovered by the tenant.[32] Indirectly, also, a statute may compel sale at the permitted price by including provisions against hoarding in the legislation controlling prices; an example of this is to be found in the New Zealand Control of Prices Act, 1947.[33]

The French law would appear in principle to agree with the English law. The *Code Civil* lays down that any condition contrary to good morals or prohibited by law is null and also nullifies the agreement on

[30] The maximum prices of iron and steel, for example, have been fixed under powers conferred by Defence (General) Regulations, 1939, regs 55, 55AA and 98 which have had effect by virtue of the Supplies and Services (Transitional Powers) Act, 1945, the latter Act having been extended by the Supplies & Services (Extended Purposes) Act, 1947 and the Supplies and Services (Defence Purposes) Act, 1951. The Act of 1945 requires yearly renewal by motions in both Houses of Parliament, the current period of renewal coming to an end on 10th December, 1955. Since the Iron & Steel Act, 1953, ss. 8–9, the Iron & Steel Board have power to fix prices, subject to the overriding powers of the Minister of Supply (s. 10) acting by virtue of the earlier legislation.

[31] See North v. Manley's Fruit Stores [1947] L.J. N.C. C.R. 141 where the county court judge held that a sale of pears in excess of the controlled price as laid down in the Pears Order, 1945 (No 821) was void.

[32] "There is nothing unlawful in letting controlled premises at a rent in excess of the legally recoverable rent. One simply cannot recover the excess, and if one does accept the excess one may be called upon to refund it," per Slade J in Schlisselmann v. Rubin, (1951) W.N. 530 K.B. See Megarry, Rents Acts, 7th edition p. 358 *et seq.*

[33] s. 25.

which it depends.[34] The distinction, which has been developed by French courts between a clause which is merely accessory to the main agreement and one which is the determining cause of the obligation[35] cannot in the case of a price-violation help to validate the contract at the permitted price. The test is the intention of the parties, and it could rarely be found as a matter of fact that a party who was willing to sell at x per ton is also willing to sell at $x - y$ per ton. It would appear on the other hand that in German law a distinction is made between laws which have as their purpose the restriction of sales and those which are not intended to restrict sales but only to ensure that they take place at prices not exceeding a fixed level. In the latter case the sales would be valid at the price fixed by law.[36]

There is thus in this respect a substantial difference between the laws of Germany on the one hand and France and England on the other. As far as the European Coal and Steel Community is concerned, it would thus seem desirable that the High Authority should itself regulate the consequences in private law of any price-fixing orders which it may make, and there does not appear to be anything in the Treaty which prevents this. The "limited direct intervention" by the institutions of the Community which is permitted under Article 5 of the Treaty seems expressly designed for cases where indirect methods would be ineffective.

3. Control of Trade and Industry by Licenses[37]

There have been more English cases on the effect on private contracts of regulations requiring certain activities—particularly building work—to be licensed than on price-fixing orders. The English courts have been more ready to adapt the private contract to the licensing regulation than in the case of a price order. The reason is that there is not the same difficulty, as where courts are asked to enforce a sale at a particular price, in assuming the agreement of the parties. The parties are agreeable; it is the government which is unwilling. Thus, while it is clear that builders who have innocently exceeded the amount of a building license granted in pursuance of a regulation, cannot recover the cost of work done in excess of the license,[38] they can sue for the proportion of the work which

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[34] CC. art. 1172.

[35] See Req. 22 déc. 1930, D.H. 1931, 33; Civ. 21 nov. 1932, DH, 1933, 19. Proposed new articles in revised code (articles 64–5): Travaux (1947–8), pp. 314–17, 346. Lloyd, Public Policy, 1953, p. 107.

[36] See authorities cited in Palandt, Kommentar, n. 3, para. 134 of the BGB.

[37] Building licenses were abolished by Defence Regulations (No 7) Order 1954 (No 1478) which came into effect on November 10, 1954.

[38] Bostel Brothers v. Hurlock, [1949] 1.K.B. 74.

is covered by the license.[39] The main attention of the courts therefore has been directed to a close examination of the relevant act or order to discover what is or is not covered by the license. Mention has already been made in this connection of a decision of the House of Lords where it was held that it was possible to interpret the particular order in such a way as to give the responsible official power to issue licenses with retrospective effect.[40] On the other hand, in a slightly earlier case, it was held that the relevant regulation governing house-building as opposed to shop-building did not entitle officials to issue licenses with retrospective effect.[41] However, any detailed examination of such cases would seem inappropriate in a comparative study, as they depend on the language of the individual statutes.

4. Regulations as to Publicity of Transactions

As an incidental to the enforcement of price regulations and licensing, a system of economic planning may require certain formalities of publicity to accompany business transactions. For example, an order of 1943 requires that under threat of a criminal penalty an invoice be supplied to every customer other than a retail customer in respect of a sale of price-controlled goods.[42] Nothing is specifically said in the order about the validity of a contract for which no proper invoice is provided. However, it has been held in such a case in 1952 that the civil plaintiff cannot sue on the contract, even if it might be argued that initially the contract is valid and only becomes invalid when the seller fails within the stated time to provide an invoice[43]. In other words, the English courts are prepared in considering whether a contract is valid or invalid to take a broad view of the purposes of the order or law in question. Clearly where price regulations are concerned, publicity is essential to secure enforcement. The courts therefore will do nothing to help the seller, who does not conform with regulations to publicity. On the other hand, it must be admitted that the English courts are much less ready to consider the wider purposes of economic planning, if called upon to force the parties into a contract to which they have not agreed, as has been already shown with regard to price-fixing.

5. Indirect Illegality

The general principle of English law is that where an agreement is legal in itself but is intended by the parties or by one of them to further

[39] Cawley and Son v. Hunnex and Sons, Estates Gazette, July 5, 1947.
[40] Howell v. Falmouth Boat Construction Co. Ltd., [1951] A.C. 837.
[41] Jackson Stansfield & Sons v. Butterworth, [1948] 2 All. E.R. 558 (C.A.).
[42] Price Controlled Goods (Invoices) Order, 1943 (S.R. & O., 1943, 604).
[43] B & B Viennese Fashions v. Lozane, [1952] 1 All. E.R. 909.

which it depends.[34] The distinction, which has been developed by French courts between a clause which is merely accessory to the main agreement and one which is the determining cause of the obligation[35] cannot in the case of a price-violation help to validate the contract at the permitted price. The test is the intention of the parties, and it could rarely be found as a matter of fact that a party who was willing to sell at x per ton is also willing to sell at $x - y$ per ton. It would appear on the other hand that in German law a distinction is made between laws which have as their purpose the restriction of sales and those which are not intended to restrict sales but only to ensure that they take place at prices not exceeding a fixed level. In the latter case the sales would be valid at the price fixed by law.[36]

There is thus in this respect a substantial difference between the laws of Germany on the one hand and France and England on the other. As far as the European Coal and Steel Community is concerned, it would thus seem desirable that the High Authority should itself regulate the consequences in private law of any price-fixing orders which it may make, and there does not appear to be anything in the Treaty which prevents this. The "limited direct intervention" by the institutions of the Community which is permitted under Article 5 of the Treaty seems expressly designed for cases where indirect methods would be ineffective.

3. Control of Trade and Industry by Licenses[37]

There have been more English cases on the effect on private contracts of regulations requiring certain activities—particularly building work—to be licensed than on price-fixing orders. The English courts have been more ready to adapt the private contract to the licensing regulation than in the case of a price order. The reason is that there is not the same difficulty, as where courts are asked to enforce a sale at a particular price, in assuming the agreement of the parties. The parties are agreeable; it is the government which is unwilling. Thus, while it is clear that builders who have innocently exceeded the amount of a building license granted in pursuance of a regulation, cannot recover the cost of work done in excess of the license,[38] they can sue for the proportion of the work which

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[34] CC. art. 1172.

[35] See Req. 22 déc. 1930, D.H. 1931, 33; Civ. 21 nov. 1932, DH, 1933, 19. Proposed new articles in revised code (articles 64–5): Travaux (1947–8), pp. 314–17, 346. Lloyd, Public Policy, 1953, p. 107.

[36] See authorities cited in Palandt, Kommentar, n. 3, para. 134 of the BGB.

[37] Building licenses were abolished by Defence Regulations (No 7) Order 1954 (No 1478) which came into effect on November 10, 1954.

[38] Bostel Brothers v. Hurlock, [1949] 1.K.B. 74.

is covered by the license.[39] The main attention of the courts therefore has been directed to a close examination of the relevant act or order to discover what is or is not covered by the license. Mention has already been made in this connection of a decision of the House of Lords where it was held that it was possible to interpret the particular order in such a way as to give the responsible official power to issue licenses with retrospective effect.[40] On the other hand, in a slightly earlier case, it was held that the relevant regulation governing house-building as opposed to shop-building did not entitle officials to issue licenses with retrospective effect.[41] However, any detailed examination of such cases would seem inappropriate in a comparative study, as they depend on the language of the individual statutes.

4. Regulations as to Publicity of Transactions

As an incidental to the enforcement of price regulations and licensing, a system of economic planning may require certain formalities of publicity to accompany business transactions. For example, an order of 1943 requires that under threat of a criminal penalty an invoice be supplied to every customer other than a retail customer in respect of a sale of price-controlled goods.[42] Nothing is specifically said in the order about the validity of a contract for which no proper invoice is provided. However, it has been held in such a case in 1952 that the civil plaintiff cannot sue on the contract, even if it might be argued that initially the contract is valid and only becomes invalid when the seller fails within the stated time to provide an invoice[43]. In other words, the English courts are prepared in considering whether a contract is valid or invalid to take a broad view of the purposes of the order or law in question. Clearly where price regulations are concerned, publicity is essential to secure enforcement. The courts therefore will do nothing to help the seller, who does not conform with regulations to publicity. On the other hand, it must be admitted that the English courts are much less ready to consider the wider purposes of economic planning, if called upon to force the parties into a contract to which they have not agreed, as has been already shown with regard to price-fixing.

5. Indirect Illegality

The general principle of English law is that where an agreement is legal in itself but is intended by the parties or by one of them to further

[39] Cawley and Son v. Hunnex and Sons, Estates Gazette, July 5, 1947.
[40] Howell v. Falmouth Boat Construction Co. Ltd., [1951] A.C. 837.
[41] Jackson Stansfield & Sons v. Butterworth, [1948] 2 All. E.R. 558 (C.A.).
[42] Price Controlled Goods (Invoices) Order, 1943 (S.R. & O., 1943, 604).
[43] B & B Viennese Fashions v. Lozane, [1952] 1 All. E.R. 909.

an illegal or immoral purpose it is unenforceable by either of the parties or, as the case may be, by the one with knowledge of the wrongful purpose. The question is usually illustrated in textbooks on the law of contract by reference to sexual immorality,[44] but it may easily relate to the problems of a planned economy. For example, contracts to supply a mining company with machinery which is to be used for expansion of the mine in a way which has been prohibited by the central planning authority. Such a situation could arise within the European Coal and Steel Community, as under article 54 the High Authority has wide powers to forbid the financing or operation of financially unsound projects.[45] In an English case[46] in 1949, for example, a contract to supply the defendants with advertising equipment which consumed electricity was held unenforceable, because the use of such equipment for advertising purposes was rendered illegal by a wartime order. On similar grounds of public policy a contract where "the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country"[47] will be unenforceable. Ignorance of a party concerning his own laws or regulations or even concerning the laws of a foreign country is not, in English law, in principle at least differently treated from knowledge of such laws.[48]

It does not follow that English law would apply the same principles to a contract made with the intention of carrying out a purpose forbidden by a supranational authority, as the same considerations of public policy would not necessarily arise; on the contrary, it might in some cir-

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[44] Pearce v. Brooks, (1866) L.R. 1 Exch 213 (agreement to supply a prostitute with a carriage for the purposes of her profession).

[45] "If the High Authority finds that the financing of a project or the operation of the proposed installations would require subsidies, assistance, protection or discrimination contrary to the present Treaty, the unfavourable opinion taken on these grounds shall have the force of a decision as defined in Article 14, and shall have the effect of prohibiting the enterprise concerned from resorting to resources other than its own funds to carry out such a project. The High Authority may impose on enterprises violating the provisions of the above paragraph fines not exceeding the sums improperly devoted to the carrying out of the project in question." The relevant sentence of Article 14 runs: "Decisions (of the High Authority) shall be binding in every respect."

[46] Automatic Mirrolite Ads. v. David Cope, [1949] W.N. 175.

[47] Foster v. Driscoll, (1929) 1 K.B. 470, per Sankey L.J. at p. 521. The case involved smuggling of whisky into the United States.

[48] But ignorance, even of English law, may be relevant to show lack of intention to carry out the contract illegally. In which event, if there is a legal and illegal method of carrying out the contract, the legal method will be assumed and enforced. See Waugh v. Morris, [1873] L.R. 8 Q.B. 202 (contract to ship hay from France to England in ignorance of an order in council forbidding landing of hay in England).

cumstances be very difficult to argue that an attempt to evade the prohibitions laid down by a supranational economic authority, to which the United Kingdom was not subject, was against its conceptions of public policy. Much more difficult are the considerations, which would arise when the rules of private international law as opposed to pure English law were applicable. For example, a German steel enterprise, subject to the European Community for Coal and Steel, makes a contract with a Swedish firm which has as its object the evasion of an order issued by the High Authority of the European Community, and the contract comes before an English court. If the proper law of the contract is German, then it is fairly clear that the contract is unenforceable, but if the proper law of the contract is Swedish, the better view is probably that the contract must be judged only by the Swedish law relating to illegality.[49]

6. Partial Illegality

The principles of English law applicable to transactions which are partly legal and partly in breach of laws or orders concerned with economic planning are not different from those which apply to partial illegality in general. Although its approach to the problem of partial illegality is rather different from art. 139 of the BGB or from the doctrine developed by the French courts, whereby a distinction is made between a clause which is merely accessory to the main agreement and one which is the determining cause of the obligation, nevertheless English law achieves very similar results to those of German and French law.[50] However, apart from the intention of the parties, there is also the kind of illegality to be considered. Where, although the parties themselves must be assumed to be willing, the enforcement of the valid part of a contract would too greatly assist a party who is anxious to break the law if he can, the courts may refuse to enforce the legal part of a contract containing illegal clauses. For example, in a recent case[51] the plaintiff sued on a promise to pay him a certain weekly salary, abandoning a further claim for expenses which, it was admitted, were separately dealt with as expenses only in order to avoid income tax. The court refused to allow the plaintiff to sue even for the weekly salary, although this part of the contract was legal. A case before the Oberlandesgericht, Hamburg, in 1949,[52] in which the validity of an exchange of fish (then a controlled commodity) for machinery was in question, was treated in a similar way.

[49] Cheshire, Private International Law, 4th ed., p. 225; Wolff, Private International Law, 2nd edition, p. 444.

[50] See Marsh, 64 L.Q.R. (1948) 230, 347; (1953) 69 L.Q.R. 111.

[51] Napier v. National Business Agency [1951] 2 All. E.R. 264.

[52] See 5 S.J.Z (1950) 238.

7. Recovery of Money Paid for an Illegal Purpose

A discussion at length of the very interesting comparative problems relating to the recovery of money paid for an illegal purpose would fall outside the scope of this paper. Briefly, English law lays down that such money cannot be recovered, following the maxims "*ex dolo malo non oritur actio*," and "*in pari delicto potior est conditio defendentis*." There are two main exceptions: firstly, where the illegal purpose has not yet been carried out and, secondly, where the parties are not *in pari delicto*. The first exception, allowing a *locus poenitentiae*, appears somewhat strange to the continental lawyer and has in fact been narrowly construed by the English courts. Thus in a case[53] in 1951, A, in breach of currency regulations, deposited a security with B in return for a promise of Italian currency. Before the currency was paid over, A sued for the return of the security, but his claim failed because, as the court pointed out, there had been no repentance, simply an inability to obtain the currency from the other party to the contract. The attitude of French law to the problem is rather different;[54] from about 1880, a gradual development of case law has led approximately to the position that money paid under an illegal contract can as a general rule be recovered, subject to some very uncertain exceptions; the Commission for the reform of the Code has refused to recommend any change in the existing law,[55] which seems to be that money paid under an illegal contract must be repaid, but that the courts have a discretion to refuse recovery in certain cases of flagrant illegality: thus restoration has been refused in the case of the corruption of an official.[56] In German law, there has been a good deal of discussion of exceptions to art. 817 s. 2,[57] BGB, which at first sight appears to follow English law in refusing recovery of money paid under a transaction which offends against a law or against *die guten Sitten*. What is very interesting for our present discussion is that apparently money paid in breach of regulations imposed as part of a planned economy can be recovered.[58] If we consider in this connection the Treaty of the European Community for Coal and Steel, it is clear that most difficult questions may arise as to the character of economic practices directly forbidden by

[53] Bigos v. Boustead, [1951] 1 All. E.R. 92.

[54] See Malaurie, *op. cit.* p. 225. Thus, in a case before the *Cour de Cassation* in 1949 (S. 50. 164; Rev. trim. dr. civ. 50, 133) it was held that the buyer of a lorry on the black market could get back what he had paid.

[55] Travaux, 1947–8, pp. 317, 329–31.

[56] D. 1913. 1. 120.

[57] See Palandt, s. 817 n.3.

[58] K.G. DR40. 869.

the Treaty, or by orders made by the High Authority under powers given in the Treaty. For example, under article 59 the High Authority can establish consumption priorities which may have the effect of making illegal certain contracts for the supply of products; can money paid by a manufacturer to obtain steel from an enterprise in these circumstances be removed? Clearly, there is a necessity for a greater degree of precision on the part of the European Coal and Steel Community itself as to the consequences of its measures on private law.

8. Impossibility of Performance of Private Contracts Owing to Planning Regulations

No attempt will be made to consider generally the developments with regard to what English law calls "frustration" either in England or on the Continent. A full survey has in any event recently been made in the *Journal of Comparative Legislation*, the German section by Dr. Cohn, the French section by M. David.[59] We are only concerned here with the particular problem of economic planning measures, in so far as they give rise to special considerations. It will be remembered that, in his famous book on *Die Geschäftsgrundlage*, Professor Oertmann specifically gave as examples where his doctrine ought to operate such cases as that of an industrialist who orders coal to be regularly delivered to his factory, which is later closed by government order or of a merchant who orders goods which he is later forbidden to sell.[60] It will also be remembered that with the help of article 242 of the BGB the German courts can in appropriate cases refashion the contract for the parties in accordance with the change in the circumstances.[61] On the other hand, in French law a comparable doctrine under the title of *imprévision* is only found in the administrative courts, although articles 1147 and 1148 of the *Code Civil* which deal with impossibility of performance would cover some of the cases dealt with in German law under the doctrine of the *Geschäftsgrundlage*. As to English law the following questions might be asked:

(a) Would a subsequent act or order which made performance by one party illegal annul the contract? The answer is in general affirmative. Thus, in a case before the House of Lords in 1944,[62] a contract in 1939 for the sale of timber which later came under wartime control was held to be annulled, together with the right to buy a timber-yard, which was

[59] Vol. 28 pp. 1–25.
[60] Oertmann, *op. cit*, p. 153 f.
[61] R.G. 2, vol 107. p 124.
[62] Denny, Mott & Dickson v. James Fraser [1944] A.C. 265.

considered inseparable from the main agreement. On the other hand, a rather fine distinction is made between a subsequent change of law and the mere putting into effect of legal powers which existed at the time when the contract was made. Thus, in one case,[63] damages for breach of contract were awarded against a hotel company which had let its roof for advertising purposes at a time when the local authority had power to acquire the building by compulsory purchase, a power which later it in fact exercised. We might here ask what is the effect, as regards the private law of one of the member states of the European Community for Coal and Steel, of, for example, article 60 of the Treaty. If under this article the High Authority, subsequent to a particular contract, defines by order the pricing systems which are in general terms forbidden by article 60, does a contract involving a forbidden price system become unenforceable in private law? Or could it be said that the parties took the risk of the High Authority exercising its powers under Art. 60?

(b) What is the effect of "frustration" on the contract? When "frustration" operates it annuls the contract, and, since an Act of 1943,[64] money paid under the contract can be recovered with an equitable deduction for any benefits which have been received under the contract. But English law differs strikingly from German law in being unable to refashion the contract to suit the changed circumstances. A recent case,[65] from which Professor Friedmann has drawn a contrary conclusion,[66] appears on closer examination not to be based on the idea of *remaking* the contract but on an *interpretation* of the actual contract. Clearly, there is a point where interpretation is only a polite name for the making by the courts of a new contract, but there is no doubt that the present tendency of the House of Lords is against any extension of the doctrine of "frustration."[67] For example, it is very doubtful whether the English courts would postpone a contract which is to be performed by a particular date; either they would hold it to be altogether annulled[68] or failure to perform it would constitute a breach of contract.[69]

[63] Walton Harvey v. Walker and Homfrays [1931] 1 Ch. 274.

[64] Law Reform (Frustrated Contracts) Act, 1943.

[65] Lindsay Parkinson v. Commissioner of Works [1949] 2 K.B. 632.

[66] Law & Social Change, p. 69.

[67] See British Movietonews v. London & District Cinemas [1952] A.C. 166.

[68] As the House of Lords did, in spite of a clause in the contract contemplating some measure of postponement, in Metropolitan Water Board v. Dick Kerr & Co., [1918] A.C. 119.

[69] We know of only one case where the "frustration" of a contract was allowed for a period and then only for two days: Minnevitch v. Café de Paris, [1936] 1 All. E.R. 884 (Contract of a dance band leader suspended on account of general mourning at time of death of King George V.)

III

The foregoing discussion is not intended to be exhaustive.[70] Its purpose, however, is to draw the attention of comparative lawyers to the new and peculiar problems involved, as far as municipal private law is concerned in the setting-up of supranational authorities. It is clear that many of the problems discussed are not susceptible of purely legal solutions and require political decisions at the governmental level. For example, there is no doubt that it will ultimately be necessary for the European Coal and Steel Community to define more precisely the effect of its decisions on the private contracts of enterprises under its control, and it will also be necessary for countries which are not members of the Community to define the attitude of their courts towards the economic objectives of that Community.

[70] For example, if a planning authority compels an enterprise to make certain goods, what effect, if any, has this on the liability of the enterprise in tort?

CHARLES SZLADITS

The Concept of Specific Performance in Civil Law

I. Anglo-American Law

The concept of specific performance has been aptly called by one of the greatest scholars of comparative law, an "abyss" between the Anglo-American and Continental legal systems.[1] One of the most impressive attempts at unification in our times, the Draft of the International Sales of Goods Act, found "the contrast between common law and civil law too deeply rooted to be eradicated"[2] and did not try to find a compromise in the matter of specific performance. Yet, it is of great practical importance to know what remedies a promisee has in case of the promisor's nonperformance of the contract and that, among these, specific performance may not only be useful, but necessary.[3]

One of the most striking differences between the Anglo-American legal system and the civil law systems is the existence of equity as a distinct body of law in Anglo-American law, and a consequent duality of rights and remedies. This duality of legal rights and equitable rights, of legal

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[1] Ernst Rabel: "A draft of an international law of sales," 5 U. of Chi. L. Rev. (1938) 559.

[2] Ernst Rabel: "Hague conference on the unification of sales law," 1 Am. Jour. Comp. L. (1952) 65. The Draft of International Sales of Goods Act, prepared by a special committee of the International Institute at Rome for the Unification of Private Law, granted the buyer the remedy of specific performance of the contract "provided that specific performance is possible and is recognized by the municipal law of the court in which the action is brought" (Sec. 25 (1)). Comp. International Institute for the Unification of Private Law: Unification of Law (Rome, 1948) 113.

[3] In this study three legal systems, the French, German, and Swiss, will be discussed. A number of valuable articles deal with this topic in one or the other foreign legal systems. Amos, M. S.: "Specific performance in French law," 17 L. Q. Rev. (1901) 372–80; Gross, Philip: "Specific performance of contracts in South African law," 51 S.A.L.R. (1934) 347–75; Jackson, H. T., Jr.: "Specific performance of contracts in Louisiana," 24 Tulane L. Rev. (1950) 401–18; Krassa, G. F.: "Interaction of common law and Latin law; enforcement of specific performance in Louisiana and Quebec," 21 Can. B. Rev. (1943) 337–68; Neitzel, Walter; "Specific performance, injunctions and damages in the German law," 22 Harv. L. Rev. (1908) 161–81; Walton, F. P.: "Specific performance in France," 3 s. 14 J. Comp. Leg. (1932) 130–31. The most comprehensive and authoritative comparative treatment of the subject can be found in Rabel, E.: Das Recht des Warenverkaufs, I. (1936), which discusses the right of specific performance in connection with sales in the various countries and also contains a comparative analysis.

and equitable remedies, has given much flexibility to Anglo-American law, even though it has added much to its obscurity and lack of systematization. It is not the place here to discuss such relative merits and shortcomings, and we will limit ourselves to a brief summary of what is known about equitable remedies relevant to specific performance.

The principles and rules of equity were worked out in the Court of Chancery during centuries, in accordance with the demands of "conscience",[4] though this conscience, which presently governs equity, has become a "crystallized conscience."[5] One of the leading general principles of equity jurisdiction was to give relief where there was no remedy or where no adequate remedy was granted by the common law. On this basis in the fifteenth century, when no remedy existed at common law for breach of contract unless the contract was under seal, the chancellors gave relief for breach of parol contracts and of written contracts not under seal.[6] When the action of assumpsit, developing during the sixteenth century, gave adequate relief by way of damages in simple contract cases, the jurisdiction of equity decayed in the realm of contract. The chancellors, however, retained jurisdiction to enforce certain contracts specificially instead of leaving the injured party to his remedy in damages, but only if damages would have been an inadequate remedy.[7] This jurisdiction to enforce specific performance of contracts has since remained one of the basic equity institutions.[8]

According to the developed common law, no remedy for breach of contract could be obtained save damages. The reason why and how this came about cannot be considered here.[9] In many cases, the payment of a sum of money was an adequate recompense; however, there were some classes of contracts in which money alone would not compensate. The enforcement of specific performance by the equity courts continued to develop in this area of classes of contracts.

The most important and oldest group of contracts which are specifically enforced are the contracts for the sale of land. Equity has always enforced these contracts, because the contract gives to the purchaser the

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[4] Potter, Harold: An historical introduction to English law and its institutions (3d ed. 1948) 550 ff.

[5] Sir James O'Connor: "Thoughts about the common law," 3 Camb. L. J. (1928) 161, 164.

[6] Walsh, William F.: A treatise on equity (1930) 24.

[7] Holdsworth, W. S.: 5 A history of English law (1924) 294 ff; Potter, *op. cit.*, 578.

[8] Walsh, *op. cit.*, 299 ff.

[9] According to Professor Hazeltine, specific performance was originally administered as part of the Common law in the Royal Courts, and there are numerous judgments to this effect during the reigns of Henry I and Henry II. Comp. Hazeltine, "Early English Equity," Essay (1913) 261.

right to a specific parcel of land, and any damages which might be recovered are no adequate compensation, because of the specific qualities of every parcel of land as to location, etc. In the case of contracts for the sale of chattels, specific performance is granted if the chattel is of a unique nature, having a special quality or value to the purchaser so that it cannot be duplicated in the market, and for this reason money damages will be inadequate. This applies to heirlooms, works of art, antiques, title deeds and muniments of title, and writings of special value.[10] The court also enforces a contract for the sale or purchase of shares in a company (corporation stock), unless there is a free market in the shares.[11] To these classes, later development added a group of cases of breach of contract in which the amount of damages is so uncertain and speculative that the plaintiff could only get a very rough estimate of them. This uncertainty and indefiniteness would render damages an inadequate remedy, and consequently the specific enforcement is preferable.[12] Thus, a contract for the sale of growing trees where the purchaser was given several years to cut and remove them was enforced specifically on the ground of inadequacy of damages[13] because speculative; or a contract for all the tar produced at the defendant's plant was specifically enforced. These are, broadly speaking, the principal fields of contracts where specific performance is granted, although there is a steady progress to widen this field.[14]

The granting or refusal of specific performance is, however, at the discretion of the courts to be exercised according to fixed and settled rules and not a matter of right even if the contract falls into one of the above mentioned groups. The general principles regulating the granting or refusal of specific performance can be summarily said to be as follows:[15]

Specific performance will not be granted if damages will be an adequate remedy.

Specific performance will not be granted of a contract the performance of which cannot be accomplished *uno flatu* but will continue over a period of time, so that continuous supervision would be necessary to secure such performance, e.g., specific performance of a contract to build, repair or maintain works or buildings.[16]

[10] Walsh, *op. cit.*, §60, 305 ff.

[11] Halsbury, 31 The laws of England (1938) 339, 409 ff.

[12] Walsh, *op. cit.*, §61.

[13] Stuart v. Pennis (1895) 91 Va. 688, 22 S.E. 504.

[14] Walsh, *op. cit.*, 300.

[15] In the presentation of these principles, that admirable work: Sir John Salmon and James Williams: Principles of the law of contracts, (2 ed. 1945) Sect. 207 has been followed.

[16] To such general rule, English law admits exception where the works are reasonably de-

Specific performance will not be granted of a contract to enter into or to continue a personal relationship such as that of master and servant.

Specific performance will be refused if the defendant upon obeying the court's order, would be entitled immediately to avoid or to undo his performance, because, as it is said, Equity does nothing in vain.[17]

Specific performance will not be granted when the performance of the contract by the defendant is conditional upon performance by the plaintiff unless the latter has already performed his part or the court can compel him to do so.

Specific performance will only be granted if the remedies were mutual, that is, the enforcement of the contract should have been possible when the contract was entered into. This requirement cannot be entirely supported.

Specific performance will sometimes be refused on the ground that what is to be done has not been specified with such certainty as to admit the court to enforce it in specie.

Equity will not assist a volunteer to enforce purely contractual rights and hence will not decree specific performance of a voluntary covenant at the suit of the covenantee.

Exceptionally specific performance will sometimes be refused on the ground that to grant it would cause undue hardship to the defendant.

In view of these limiting principles, the remedy of specific performance is strongly restricted even in cases where the subject matter of the breached contract would otherwise warrant its application and in spite of the fact that there is a tendency in modern law to extend its utilization.

One of the special features of equity, which rendered its remedial force so effective, was that it acted *in personam*, i.e., the decrees of the courts of equity were enforceable against the person of the defendant by coercive measures, in the last resort by putting him into jail for contempt. However, this remedy was, in its early development, sometimes very inadequate because it was subject to the accident of control over the person of the defendant, and if the latter absconded there was no way to enforce the decree. In the course of a long development, the application of real process was expanded in the enforcement of equitable decrees to supplement the process directed against the person of the defendant.[18] In the

fined, the plaintiff has a substantial interest in the performance of the contract which cannot be adequately met by an award of damages, and the land on which the works are to be erected is in the possession of the defendant. Wolverhampton Corpn. v. Emmon (1901) 1 K.B. 515; Molyneux v. Richard (1906) 1 Ch. 34. The practice of the courts in the United States seems to be more liberal in this respect. Jones v. Parker (1895) 163 Mass. Rep. 564.

[17] E.g. in case of a contract of lease where the plaintiff tenant had already committed such acts as would entitle the lessor to forfeit the lease when granted. Swain v. Ayres (1888) 21 Ch.D. 289.

[18] Huston, C. A.: The enforcement of decrees in equity (1915).

modern law, most Anglo-American legal systems confer upon courts the power, in case the court directs the party to make a deposit or delivery, or to convey real property, and this direction is disobeyed, to require the sheriff to take and deposit or deliver the chattels, or to convey the real property in conformity with the direction of the court (usually directly to plaintiff). In English law, the court may order some other person, appointed by the court, to perform the act required at the expense of the disobedient party.[19] In the last resort, there always remains the possibility of attachment for contempt of court, and putting the disobedient defendant in jail until he has purged his contempt by doing the act required.

This is briefly the picture of specific performance in Anglo-American law with which we are to compare the concept of specific performance in the civil law systems. The use of the term specific performance of contract is actually misleading when applied to civil law systems, because of the definite connotations which go with this term in Anglo-American law. It would, however, be difficult to find another or better term, and perhaps it is sufficient to emphasize that the term specific performance will be used with regard to civil law in a functional sense. That is, it will be applied to those institutions which fulfil the function of specific performance in its wider and rather loose meaning.[20]

It is a basic principle of modern civil law systems that the promisor is obligated to perform his duty under the contractual obligation and, in the case of a breach, the promisee has the right to enforce this duty, while it is possible and conscionable.[21] The idea that in the case of breach

[19] Rules of the Supreme Court, 1883. Order 42, rule 30.

[20] Specific performance as a general rule is the proper remedy to enforce the observation of a positive and executory contract and thus is distinct from a remedy for the enforcement of a negative contract (by injunction), or of an executed contract by injunction, or of the enforcement of a right for the delivery of a specific chattel flowing from a contract. Comp. 31 Halsbury's Laws of England (2 ed. 1938), no. 359, p. 238. The term specific performance with regard to civil law will refer to all of these remedies and will go even beyond this sphere. In view however of the difference in nature of the equitable remedy of injunction from that of specific performance, we shall consider in this article only the enforcement of positive contracts by specific performance and not discuss negative obligations which should be considered by a comparative study on injunctions.

[21] In Roman law the situation was different. In the formulary procedure judgment was always for money (damages) (Gaius, Inst. IV, 48); only in the later empire, under the procedure *in cognitio* was it possible to have a judgment for a specified thing (Inst. 4, 6, 32.). Comp. Buckland: Text-book of Roman law (2 ed. 1932) 661, 669; Monier: 2 Manuel élémentaire de droit Romain. (3 ed. 1944) no. 173, pp. 310–11. "Judgement in the classical procedure was always for money. Hence there could never be, technically judgment for specific performance, except indeed where it was the same thing. In fact over the main field of obligations there was nothing of the kind. But in actions *in rem*, and a few others, there was a device, the *arbitrium* clause which gave a somewhat similar result. When the iudex had made up his mind in favour

the promisor's primary obligation of performance is transformed into a secondary obligation to compensate the promisee by payment of damages is absent from civil law.[22] Strangely enough, although the promisee's right to enforce an obligation specifically is a fundamental principle of civil law, it is expressed neither very clearly nor emphatically in the provisions of the relevant codes.[23] The French Civil Code, in a section dealing with the resolutive condition, provides that "the party complaining that the obligation has not been fulfilled, has the choice either between *compelling the other party to carry out the agreement*, when it is possible, or demanding its cancellation with damages".[24] The German Civil Code states laconically: "By virtue of an obligation, the creditor is entitled to claim performance from the debtor."[25] In the Swiss Code of Obligations, the basic provision dealing with nonperformance simply presupposes the promisee's right to specific enforcement, but does not state it;[26] only in a section dealing with the rescission of the contract is this right mentioned.[27] It seems, therefore, appropriate to examine first this

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of the plaintiff, he made a *pronunciatio* to that effect, but before proceeding to give judgement, he could, if he thought fit, direct the defendant to make restitution *in specie*. If the order was disobeyed there would be a money *condemnatio*. . . . In the later *cognitio* system when the *iudex* was an official, things were altered, and he had power in any action to condemn *in ipsam rem*, and the magistrate would see that the order was obeyed, *manu militari* if necessary. This goes further than our law [English law], for there is no suggestion that he is not to do this if damages would be an adequate remedy. . . ." Buckland and McNair: Roman law and common law (2 ed. by Lawson, 1952) 412–13. Comp. also Jackson, *op. cit. supra*, note 3 and Huston, *op. cit. supra* note 18, which give a more detailed description of specific performance in Roman law.

[22] ". . . a breach of contract is a new operative fact with important legal consequences . . . [A] breach always operates to create new rights in the injured party and new correlative duties in the wrongdoer. The sum total of rights and duties existing after a breach may conveniently be referred to as a *secondary obligation*." Anson, W. R.: Law of contract. 5 American ed. by A. L. Corbin (1930) 506. The formulation by Holmes that "The duty to keep a contract at common law makes the prediction that you must pay damages if you don't keep it and nothing else, if you commit a tort you are liable to pay a compensatory sum. If you commit a contract you are liable to pay a compensatory sum unless the promised event comes to pass and that is all the difference," aptly emphasizes the difference in view. This formulation, however, does not take account of the action of debt, and the situation arising from a failure of consideration in bilateral contracts.

[23] This may be because it was considered to be so obviously implied in the concept of "*obligatio*."

[24] Civil code (C. civ.) §1184 (2).

[25] Civil code (BGB) §241.

[26] Code of Obligations (OR.) §97 (1): "Where performance of the obligation cannot be fulfilled or properly fulfilled, the debtor is liable for damages, unless he proves that there is no fault on his part."

[27] Code of Obligations (OR.) §107 (2). "In default of performance . . . the creditor *may still sue for performance* and damages for delay, but in lieu thereof, he may, if he gives immediate notice to that effect, forego subsequent performance, and at his option, either claim damages for nonperformance or withdraw from the contract." Emphasis supplied.

right of specific enforcement of contracts and the manner in which it is effected in the legal systems of France, Germany, and Switzerland, one by one, and then to compare it with specific performance as it is known in Anglo-American law.

II. French Law

Specific enforcement of contracts (*exécution directe*) is a generally accepted institution and is contrasted to enforcement by way of damages (*exécution par équivalent*). Specific enforcement can again be either direct or indirect, the latter being a form of puntive "damages," designed to compel the promisor to give the contracted-for performance. This is the "*astreinte*."

Obligations can be specifically enforced only if they are immediate and, in order to become immediate in this sense, the promisor, in addition to his nonperformance, must be put in default, which requires a formal demand by the promisee for due performance, the so-called *mise en demeure*.[28] Once this demand has been made, nonperformance becomes a breach in the technical sense and direct enforcement may ensue.

The wording of the Civil Code with respect to the right of specific enforcement is not very fortunate, and it may have given rise to the doubts which still seem to persist that there may be some groups of obligations not specifically enforceable.[29] The Civil Code divides obligations into two main groups: obligations to give (*de donner*) and obligations to do or to abstain (*de faire ou de ne pas faire*),[30] and as to the latter group, the relevant provision, section 1142, states only, that "every obligation to do or not to do resolves itself in damages in case of nonperformance." This careless formulation is apt to give the impression that obligations to do cannot be specifically enforced and the remedy for their breach is only a claim for damages, a view which is contradicted by the practice of the courts and denied by most doctrinal writers.[31] There exist, how-

[28] "The general principle of the French law is that when the debtor delays to fulfil his obligation and the creditor takes no action it is to be presumed that he acquiesces in the delay. It is not until after there has been a formal demand by the creditor that the debtor's delay will be considered as prejudicial to the creditor. . . . Delay itself is not enough, it must be *un retard officiellement constaté et imputable au débiteur*. This was the old French law and it has not been altered." Amos and Walton: Introduction to French law (1935) 177. The putting in default is effected by a *sommation*, which is a form of demand in writing served by a bailiff, or by a judicial demand by a writ of summons.

[29] Even a work of such outstanding excellence as the *Rechtsvergleichendes Handwörterbuch* may be misleading in its too concise formulation. Comp. v. 6, p. 284.

[30] Civil code §§1136–1141 (Obligation de donner) and §§1142–1145 (Obligation de faire ou de ne pas faire).

[31] Planiol et Ripert (Esmein): 7 Traité pratique de droit civil français (2 ed. 1954). No.

ever, important differences between the two groups of obligations with regard to the practice of enforcement.

Where the contract is an obligation to give, that is, to deliver a thing, the rules pertaining to it render specific performance very simple. The obligation to deliver a thing, according to French law, is complete by the sole consent of the parties, and it bestows ownership upon the creditor.[32] Specific performance of such contracts simply means an action for recovery, which is enforced by way of the *saisie-revendication*. In this proceeding, specific chattels, which are wrongfully detained by the defendant, are attached by the sheriff as the property of the plaintiff and restored to him.[33]

The number of obligations to give is, however, limited, and by far the greater number of contracts come under the heading of obligations to do or not to do. In this group, specific enforcement of the contract seems to be clearly recognized by the courts, in spite of the unfortunate wording of

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780, p. 89. [Hereafter Planiol-Ripert: Trait. prat.]; Aubry et Rau: 4 Cours de droit civil français, No. 299, p. 64.; Laurent: 16 Principes de droit civil français (1859–1898) No. 197.; Demolombe: 24 Cours de Code Napoléon (1869–70) No. 488.; Baudry-Lacantinerie et Barde: 1 Traité de droit civil: Des obligations (3 ed. 1906–1908), No. 431.; Colin, A. et Capitant (Julliot de la Morandière): 2 Cours élémentaire de droit civil français (10 ed. 1947–50) No. 155.; Josserand: 2 Cours de droit civil français, Nos. 590–591. For an historical discussion, see the excellent study by Meynial, Edmond: "De la sanction civile des obligations de faire ou de ne pas faire," 56 II. Revue Pratique de Droit Français (1884) 385–483. The claim for specific performance existed before the Code Civil. Thus Pothier discusses the possibility of specific enforcement of an obligation to do. "The first question which arises is whether a lessor, who is able to deliver the thing and refuses to do so, can be compelled *manu militari* to give the lessor occupation, or whether the lessee can obtain only damages. . . . [The] questions depend upon the interpretation to be given to the maxim *nemo potest praecise cogi ad factum* [no one can be compelled to give specific performance of an undertaking to perform some act]. We said that the maxim applied only to obligations having as objects some physical act on the part of the person of the debtor to which he could not be compelled without exercising constraint upon his person and his liberty. An agreement to enter my service, or to go somewhere on my business . . . are examples of this kind of obligation. But it is different in the case of the seller's obligation, under a contract of sale, to deliver a certain thing to the purchaser, or in the case of a lessor's obligation in a contract of lease. These are not mere acts, they are acts *quae ad dationem magis accedunt*, to the specific performance of which the debtor can be compelled, without restraint being exercised upon his person or his liberty by allowing the purchaser or lessee to obtain, through the sheriff, possession of the thing sold or let, to be retained by the purchaser as owner, or to be enjoyed or used by the lessee during the period of lease . . ." Pothier, R. J.: Treatise on the contract of letting and hiring (contrat de louage). Tr. by G. A. Mulligan. (1953) No. 66, pp. 27–28.

[32] Civil code §1138.

[33] Code of civil procedure §826 and ff. Comp. Laborde-Lacoste: Voies d'éxécution (1952) 135–139. The *saisie-revendication* seems also to be applicable in case of obligations of kind, that is, in case of a sale of goods, but in practice such procedure is almost unknown. Comp. Rabel, Ernst: 1 Das Recht des Warenverkaufes (1936) 202.

section 1142.[34] The circumstances and form of such enforcement are subject, however, to certain qualifications. Specific enforcement must be possible (in the practical and reasonable sense of the word) and must not be oppressive to the personal rights of the debtor; moreover, it must be the direct enforcement of an obligation contained in the contract and not that of a new obligation incidentally arising as a result of the nonperformance.[35] As specific enforcement is in practice rather the exception than the rule, because obligations to do are frequently impracticable of enforcement in kind, the Court of Cassation has held that whenever specific performance is ordered by the court, the judge must satisfy his decision by stating affirmatively that the contract is susceptible of being carried out specifically.[36] Thus, it is undeniable that the judge has a certain discretionary power in refusing to render judgment for specific performance. This, however, does not alter the fact that the plaintiff has a primary right to demand it. As it is the promisee's basic, primary right to demand specific performance, he need not, in an action for specific performance, make an alternative claim for damages in his statement of claim, and if the court finds the enforcement *in specie* impossible, it just orders the payment of damages on the ground that the plaintiff has a right to be indemnified where *in natura* performance cannot be ordered.[37]

Is, however, this enforcement of specific performance a duty of the

[34] This unhappy formulation has been changed in the proposed Franco-Italian draft Code of Obligations (section 87) to the following: "The debtor is held to the complete performance of the obligation and failing it to damages." The new Italian Civil Code simply states (section 1218): "A debtor who does not perform his obligation exactly is liable for damages unless he can establish that the nonperformance or the delay in performing is due to a cause which cannot be charged to him."

[35] In the case Chemins de fer de Paris à Orléans c. Vidal (Cour de Cassation, June 4, 1924 [1927] Dalloz I. 136), plaintiff demanded that damages suffered during transport by certain goods should be repaired by defendant. The court held that there is no legal provision which would authorize a court to order one of the parties to repair (*in specie*) a damage caused by her if this would mean the doing of an act which was not imposed upon defendant either by the contract or by express legal provision.—This decision may be contrasted with the case of Admin. des Chemins de fer de l'Etat c. Gauthier (Cour de Cassation, January 19, 1926 [1926] Dalloz Hebdomadaire, 115) where the Cour de Cassation found that the plaintiff had a right to demand the imposition of a duty to repair a railway carriage which was damaged by defendant since reparation *in specie* was a duty, provided in the general conditions of the defendant company's tariff agreement. Thus, in the former case the specific performance was refused because it would have meant compelling defendant to do something, which was not provided in the original contract; in the latter case, the specific performance could be granted because of a provision governing reparation *in specie*.

[36] Comp. case cit. *supra* in note 35.

[37] The Cour de Cassation decided that the ex-officio conversion of a claim of specific performance into damages is not *ultra vires*, even though the plaintiff has not demanded damages (*"sans conclure à des dommages interêts . . ."*) as an alternative. Guillard et autres c. Hospices de Lyon. Cour de Cassation, March 19, 1855 [1855] Dalloz I, 297.

courts, or merely discretionary with them? As it is the *normal* remedy and damages are only a subsidiary device, it has been stated that it must be ordered whenever the promisee demands it, provided that it is possible.[38] This statement must be qualified because, according to a constant practice, the courts reserve for themselves a discretionary power to decide whether the payment of damages is not the more just and expedient remedy.[39] In the exercise of this power, the courts refuse to grant specific performance whenever the costs would be disproportionately high with regard to the damage caused,[40] or where the promisee can have no real interest in receiving specific performance, or the latter would disturb intervening rights of third parties.[41]

A special form of specific enforcement is provided in cases where the promisee may obtain elsewhere the result promised by the debtor without the debtor's active co-operation. In such cases he may be authorized by the court to carry out the promised act, or obtain the required result himself or by employing someone else at the debtor's expense.[42] The promisor, however, must reimburse the promisee for expenditure that would be necessary, if he proceeded in the most economical fashion in the carrying out of the contract.[43] The promisee may also be authorized to destroy, at the expense of the debtor, what has been done in violation of an agreement, or he may have it destroyed by order of the court.[44] In case of a violation of an agreement the court may proceed simply by ordering an act which would bring about the necessary result; thus, it may compel the closing down of a business undertaking carried on in

[38] Comp. Favart, Rapport au Tribunal, Locré xii, p. 433; Laurent 16, No. 199; Baudry-Lacantinerie et Barde I. No. 436; Aubry et Rau, 4, 299; Planiol-Ripert: 7 Trait. prat. No. 783. A recent case has well illustrated this situation. A borrower is obliged to return the things loaned in the same quality and quantity (C. civ. §1902); if this is not possible, he is obliged to pay their value (C. civ. §1903). In this case, a goldsmith borrowed some gold which was lost; he offered to pay damages, because it was not possible to buy gold because of a government restriction on the purchase of gold. The court found that he must restore the gold in kind, because only where there is an absolute impossibility can he offer the subsidiary remedy; as a goldsmith holds a license from the Banque de France to purchase (a limited) amount of gold, the restitution *in specie* had not become impossible. Tibaldi v. Soc. des fondeurs de métaux précieux, Paris, July 17, 1946 [1948] Dalloz, 169 note Weil. As the annotator to this decision pointed out, performance *in specie* is the normal mode of performance, and as the defendant borrowed gold, he obligated himself to restore same amount of kind.

[39] Comp. Planiol-Ripert: 7 Trait. prat. No. 783, note 3.

[40] Cour de Cassation, February 2, 1904 [1904] Dalloz I. 271; Cour de Cassation, March 23, 1909 [1910] Dalloz I. 343.

[41] Cour de Cassation, April 10, 1872 [1874] Dalloz I, 35; Cour de Cassation, May 7, 1928 [1928] Semaine juridique 749.

[42] Civil code §1144. Comp.: Cour de Cassation, March 14, 1899 [1899] Dalloz I, 445.

[43] Cour de Cassation, July 2, 1945 [1946] Dalloz 4.

[44] Civil code §1143.

violation of an agreement not to compete,[45] or it may declare that its judgment takes the place of the agreement which the promisor refused to execute.[46] These cases seem to illustrate the flexibility of the courts' handling of this remedy.

The execution of the court's order can be put into effect either by attachment or by coercion. The execution by attachment (*saisie*) may be effected by attachment of specific chattels and their handing-over to the one entitled thereto by the sheriff, or attachment of real or personal property for judicial sale, in order to realize the sums necessary to pay for restitution (or reparation) in kind. Coercion is exercised by way of *astreinte*, which is a judgment ordering the payment of a certain sum of money for each day, or other unit of time of delay, if the debtor does not perform within a fixed time. It is a provisional and conditional imposition of a fine, the effectiveness of which may be less successful than may at first appear.

It is said that *astreinte* has three fundamental characteristics: it is arbitrary, it is comminatory, and it is provisory.[47] It is arbitrary in so far as the amount ordered to be paid by the promisor is not measured by the value of the performance and is set in order to induce the promisor to perform his duty.[48] It is comminatory because it is not definite and by performing the obligation the promisor may be released by the court from paying it. It is provisory because it can be altered in amount, reduced or increased, by the judge who decreed it.

The effectiveness of *astreinte* is doubted, because according to present practice, and as a consequence of its comminatory nature, when it is executed the judge has to reduce it to the amount of the actual loss suffered in consequence of the nonperformance.[49] The compulsive effect of the

[45] Caumont v. Drouart, Cour de Cassation, February 21, 1862 [1862] Dalloz I, 185.

[46] Thus, where a lessee refused to sign a new lease (contract) in breach of his previous agreement, the court decided that its judgment will replace the document which the promisor ought to have signed before a notary. Grondin v. Rousteau, Cour de Cassation, June 11, 1925 [1925] Gazette du Palais II, 436.

[47] 7 Planiol-Ripert (Esmein), No. 791, pp. 104–106; 1. Répertoire de Droit Civil, Astreintes, pp. 421–22.

[48] There is also a form of *astreinte* in which the court definitely establishes the amount of damages per time units of delay (astreinte dommages-intérêts). This, however, is damages assessed by time, even though called *astreinte* and does not possess the characteristics of the *astreinte* proper. Comp. 1 Répertoire de Droit Civil, pp. 425–26.

[49] The practice of the courts is not quite clear. There is a line of decisions which lay down the principle: Cour de Cassation, January 20, 1913 [1913] Dalloz I. 35; March 14, 1927 [1927] Dalloz Hebdomadaire, 274; July 5, 1933 [1933] Dalloz Hebdomadaire, 425. There are however decisions where the *astreinte* seems to have an independent and parallel existence with the damages. In the case Boix et Sospendra v. Delfau, Cour de Cassation, October 25, 1949 [1950]

device is consequently strongly reduced, if the defendant knows that whatever the amount is said to be, at the time of execution, it will be reduced to the real value of the damages. As a consequence, for some years courts adopted an attitude of declaring the *astreinte* definite and final; this more severe attitude has not been accepted by the Court of Cassation and must be considered a tentative attempt, not yet certain of final success.[50]

Astreinte if considered functionally, may be regarded as a method of specific performance; if considered from the point of view of its place in the legal system of France, it may be compared to the contempt sanction of the common law. As it is really a method of enforcing a judgment for specific performance of contracts to do or not to do, the latter view seems to be more precise.

As a method to coerce the fulfilment of a judgment of specific performance of a contract, the *astreinte* in recent years has been most frequently utilized as a compelling measure to force a recalcitrant tenant to evacuate premises.[51] A final judgment for evacuation entitles the interested party to demand the forcible ejection of the tenant, *manu militari* by the public authorities. But the administrative authorities foreseeing the commotion caused by their interference generally refuse to do so, in the hope, which is usually correct, that the unfortunate plaintiff will not embark upon a long struggle before the administrative tribunals to obtain damages against the state for this refusal. Under these circumstances, it has been found that *astreinte* is a useful means of coercion, and as a matter of fact, it is the only one left. Moreover, in view of the housing situation, the refusal to vacate premises might cause very substantial damage to the

Dalloz I. 64, there was a sale of a truck which was illegal for tax evasion. A judgment was given ordering to restore the truck to the seller, to pay him 200,000 frcs. damages for deprivation of use, and to pay 500 frcs. *astreinte* per day of delay. On appeal it was found that, as the seller was party to the illegal action, he had no claim for damages, but was entitled to the *astreinte*. "The condemnation to pay *astreinte* had for its only aim to assure the performance of the decision in forcing the purchaser to restore the truck in consequence of the avoidance of the contract, and was not in contradiction with the judgment for damages, of which it was independent." It is true, however, that the special circumstances of the case may explain this decision without fundamentally conflicting with the line of cases which maintain the comminatory nature of the *astreinte*. The delay in restoring the use of the truck may cause real damage independent from the damages which could not be claimed because of illegality.

[50] Comp. Fréjaville: "La valeur pratique de l'astreinte," Jurisclasseur Periodique [1951] 1, 910; Meurisse: "L'astreinte non committoire," Gazette du Palais [1948] v. 2, Doctrine 11; 7 Planiol-Ripert (Esmein) No. 795 bis, pp. 112–114. Pekelis, A. H.: "Legal techniques and political ideologies," 41 Mich. L. Rev. (1943) 665–692.

[51] In this field the Law of July, 1949, enacted special provisions, which prohibit certain *astreintes* and provide that the amount of the damage really suffered must not be exceeded.

interested party, and as a consequence, the final assessment of these damages may be very near to the amount set by the court as *astreinte*.[52]

It would, however, be misleading to pretend that the *astreinte* has not been used in other fields. The courts have applied it, e.g., against the defendant to perform certain works, though they could have been executed at his expense on the basis of section 1144,[53] or to oblige a defendant to destroy works, which also could have been done at his expense on the basis of section 1143.[54] It has been utilized to oblige to give accounts,[55] to grant a right of procuration,[56] to compel a party to fulfil certain conditions (clauses) in a contract,[57] and in numerous other instances.[58] In this respect, it may be an exaggerated view to consider *astreinte* as broadly as some authors claim it to be.[59]

In its practical functioning, the *astreinte* is perhaps more frequently applied, like contempt procedure in Anglo-American law, in the enforcement of decrees of specific performance, even if in the last resort it may not be so effective as the latter. If one considers how reluctantly and how rarely an attachment for contempt is ordered for the nonperformance of a decree of specific performance, it may be prudent not to reach easy conclusions by comparing the practical effectiveness of the respective devices. Especially so, as the coercive force of *astreinte* is in the overwhelming majority of cases not necessary: on the one hand the *saisie* or the *saisie-revendication* works as a practical measure where the obligation is to deliver a thing; on the other hand, the plaintiff may carry out an act at the debtor's expense, a possibility that goes beyond what can usually be expected of specific performance in Anglo-American law.[60]

III. German Law

A contractual obligation in German law entitles the promisee to claim performance from the debtor (promisor).[61] In case of nonperformance, the promisee may sue for performance and obtain a judgment in which the

[52] Consequently, the comminatory nature of the device will be of little importance in reducing the coercive effect. Comp. Vizioz: "Les pouvoirs du juge des référés en matière d'astreintes," Jurisclasseur Periodique [1948] I, 689.

[53] Cour de Cassation, November 3, 1930 [1930] Dalloz Hebdom. 605.

[54] Cour de Cassation, March 14, 1927 [1927] Dalloz Hebdom. 274.

[55] Cour de Cassation, July 5, 1933 [1933] Dalloz Hebdom. 425.

[56] Cour de Cassation July 23, 1889 [1890] Dalloz I, 31.

[57] Court of Appeal of Aix, April 19, 1928 [1930] Dalloz II, 17, note by Pic.

[58] Much use is made of it also in litigation concerning family relationships.

[59] Comp. Pekelis, *loc. cit. supra*, note 50.

[60] In English law, however, there exists a similar provision to Code civ. sect. 1143, the Order 42 rule 32. Comp. *supra*, note 19.

[61] Civil code (BGB) §241.

promisor (the debtor) is ordered to render performance (*Leistung*).[62] This judgment is the so-called *Leistungsurteil*; the promisee's claim is the *Erfüllungsanspruch*.

The claim of the promisee to enforcement, that is, to the specific performance of the contract, is in German law the inherent and normal right flowing from a contract. In that sense to call it a primary right might even sound like an understatement, implying that it was not "*the*" claim, but only one in a series of possible *other* claims. In principle, at least, as long as specific enforcement is possible, no damages may be demanded by the promisee for nonperformance of the contract. It is true that in practice this principle is not apparent, because, in the majority of cases, the creditor will sue for damages, and the practical importance and superior number of actions for damages may obscure the importance and pre-eminence of the claim for specific performance.

The prominence of the claim for specific performance becomes much clearer, if we consider it from the procedural aspect of the relevant provisions. To reiterate, in case of a breach of contract, the promisee may sue for damages, but only if the performance, that is, the specific enforcement of the contract, is no longer possible. This general principle is not clearly stated; therefore, the point must be elaborated a bit further.

The German Civil Code distinguishes between two kinds of breaches of contract: nonperformance due to impossibility (*Unmöglichkeit*) and mere delay in performance (*Verzug*). The former is not necessarily a breach, unless it is an impossibility for which the promisor may be held responsible, and it is distinguished from impossibility, for which he may not be held responsible.[63] According to the provisions of the Civil Code, the debtor (promisor), if he is liable, shall compensate the creditor for any damage arising from nonperformance, "in so far as the performance becomes impossible in consequence of a circumstance for which the debtor is

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[62] Some terminological difficulty is caused by the use of the term performance, indicating both the subject matter of the contract, the *Leistung*, and the performing of it, the *Erfüllung*. The German can express himself precisely by saying "*Erfüllung der Leistung*" or "*Nichterfüllung der Leistung*," whereas to say "performance of the performance" or "nonperformance of the performance" is nonsensical.

[63] "Subsequent impossibility (*nachfolgende Unmöglichkeit*) as such does not constitute a breach of contract. On the contrary, on principle it discharges the contract [Section 275 (1)].

"The term "*Unmöglichkeit*" in German law is reserved for cases where performance is impossible for everybody, not for the debtor only. Where performance is impossible for the debtor only, the Code uses the technical term "*Unvermögen*". . . . If the impossibility is caused by an event for which the debtor is responsible, the debtor is liable in damages to the creditor. The burden of proof that the impossibility is not due to a fact for which he is responsible rests upon the debtor (Section 282)." E. J. Cohn in I Manual of German law (1950) 76–77.

responsible."[64] The prerequisite of the claim for damages is, consequently, that specific performance should have become impossible. The burden of proof of the impossibility is upon the party who relies upon it.[65] Thus, where the promisee sues for performance, it is the debtor who must prove the impossibility, if he relies upon it as a defence, but where the promisee sues directly for damages, it is upon him to prove that the performance has become impossible. This again indicates that the basic right upon which all further remedies depend, and which preceded them, is the claim for specific performance. As a consequence of the shifting of the burden of proof, it seems probable that to sue for performance is not only the "primary" remedy, but also the more advantageous one for the promisee, because not only does the burden of proving impossibility fall upon the defendant, but, even if he sustains this burden, the plaintiff may still substitute a claim for damages.[66]

In order, therefore, to simplify this somewhat complicated situation, a further provision of the code renders it possible for a direct demand for damages for nonperformance to be made under certain conditions, without the required proof of impossibility. After a final judgment (for specific performance) has been rendered against the promisor, the promisee may allot him a reasonable period for performance upon notice that at its expiration he will refuse to accept it.[67] When this period has expired without performance by the promisor, the promisee may sue directly for damages. Application of these provisions, however, bars his further right to claim specific performance.[67a] These provisions are intended to be of benefit to the promisee. If he obtains a judgment for performance (specific performance), ordinarily he must attempt to execute it and, if unsuccessful, must begin a new action for damages for nonperformance. By the provisions of section 283, he must only allot a reasonable period to the promisor for performance and after its expiration he may immediately proceed to sue for damages, without having to prove the impossibility of specific performance, or, what amounts to the same, without attempting

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[64] Civil code §280 [I].

[65] The general principle of the burden of proof may be said to be "that each party has the burden to prove the existence of all the factual premises of all those norms (rules) which must be applicable in order that his claim should be successful." Rosenberg, Leo: Lehrbuch des deutschen Zivilprozessrechts, 6th ed. (1954) 525. For the comparative aspects of the burden of proof, see Lenhoff, Arthur: "The law of evidence. A comparative study based essentially on Austrian and New York law," 3 Am. Jour. Comp. L. (1954) 330 ff.

[66] Sec. 268 of the Code of civil procedure.

[67] Civil code §283.

[67a] Civil code §283. Application of these provisions, however, bars his further right to claim specific performance.

to execute the final judgment for specific performance.[68] The provisions of section 283 give a further advantage to the promisee. Once he has obtained a judgment for specific performance, following which he has allotted to the promisor a time limit for performance, he may sue upon its expiration for damages, corresponding to the value of the promisor's nonperformed obligation. The burden of proof that the damage suffered by the promisee is less than the amount claimed, or that there was no damage, is in this case upon the defendant.

The plaintiff may not sue for a judgment for specific performance where performance has become impossible. This rule is not stated in the Civil Code, but the *Reichsgericht* has clearly decided that to render a judgment for specific performance at a time when such performance is obviously impossible would be nonsense.[69] Conversely, according to the standing practice of the courts, if the promisor offers proof that the performance has become impossible, this may be ruled out, and judgment for specific performance may be given against him, if it is certain that he is responsible for the impossibility.[70] The promisee may proceed with the execution and thus ascertain by an unsuccessful attempt that specific performance has actually become impossible and then sue for damages. The reason for this rather strange rule is equitable, since it will maintain the promisee's claim for specific performance during the action, and in case of its failure secure for him the more favorable remedy implied in

[68] In the case of a breach of a reciprocal (mutual) contract the promisee may either claim performance, or demand damages for nonperformance, or rescind (withdraw from) the contract (so-called *Rücktritt*) or consider the contract discharged and either refuse to go on with his own obligation or claim restoration of his performance.

[69] B. und Sohn v. V., German Supreme Court, May 16, 1923, 107 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter RGZ] 15. Plaintiff deposited 2 bales of tobacco in defendant's custody. When claimed, defendant refused delivery because he had (erroneously) already handed the two bales to persons who pretended to collect it for plaintiff. Plaintiff sued for performance and his claim was dismissed. The aim of a judgment for performance—said the court—is execution, therefore to give judgment for specific performance of an obligation which is ascertainably and objectively impossible would be absurd.

[70] In such cases it is necessary, however, that promisor's inability to perform should neither be obvious nor admitted by the promisee. Comp.: 54 RGZ 28, 32; 107 RGZ 15, 18; 109 RGZ 234, 235; 160 RGZ 257, 263.

K. und Co. v. Kl, German Supreme Court, February 18, 1903, 54 RGZ 28, 33. In this case plaintiff sent 18 rolls of paper to defendant with bills of consignment to order of plaintiff. Defendant, however, sold this paper to third parties. Then plaintiff sued for delivery of eighteen rolls of paper; defendant pleaded impossibility, because the paper had been used up; plaintiff contested this and insisted on his claim for performance and not damages. Judgment for performance was rendered. The reasoning of the court was that, where impossibility is pleaded, but has not been ascertained and is contested by plaintiff, there is no bar to the claim for performance. Moreover, the court stated a very important point: the debtor has no absolute claim to be permitted to prove the impossibility, unless he can simultaneously prove that he is not responsible for such impossibility of performance.

section 283, namely, to assess the amount of his damages according to the value of the obligation.[71] This solution, however, is unfair to the debtor, in ruling out proof which would be sufficient to bring about a dismissal of the action against him.[72]

These rules relating to the enforcement of a promisee's claim for specific performance are unnecessarily complicated and unwieldy. They demonstrate, however, the pre-eminent position of the claims for specific performance in German law.[73]

The promisee's right to obtain specific performance—or rather, to obtain a result which corresponds to specific performance—does not end with the enforcement of his direct claim to performance. The Civil Code contains other provisions which bring about the same result. Thus, the provisions on damages uphold the paramount principle of restitution in kind. The Code provides that where someone becomes liable in damages, he is bound to bring about the condition which would exist if the occurrence which rendered him liable to compensate the injury caused had not occurred.[74]

This principle of compensation in kind (*Naturalherstellung*) where the promisor is liable for damages, is merely another type of specific performance. It may take various forms, e.g., where defendant sold machines to the plaintiff, but before delivery of them sold his entire stock to a third party in collusion with the latter, it was held that since this third party became liable in damages, he was ordered to hand over the machines to plaintiff against payment of the original purchase price.[75] Sometimes this compensation in kind brings about a situation which did not exist before but which corresponds to the situation which was expected from due performance of the contract. ". . . [R]estoration in the sense of §249 does not mean restoration to exactly the same state which existed before the breach . . . The injured party may under certain circumstances be entitled to demand something that did not exist before, provided that, according to experience, he would have certainly obtained it, had the act

[71] This is especially important in the case of contracts where a price etc. was expressly stipulated.

[72] Rabel, E.: "Über Unmöglichkeit der Leistung und heutige Praxis," Rheinische Zeitschrift für Zivil und Prozessrecht. (1911) 471 ff.; Rabel, E.: 1. Das Recht des Warenverkaufs (1936) 381; Blomeyer, Arwed: Allgemeines Schuldrecht (1953) 165–66.

[73] In practice, some of the complications are avoided by the creditor's action for damages for delay of performance in all cases where money compensation is considered sufficient.

[74] Civil code §249. The same section further provides that in the case of injury to a person or damages to a thing, the creditor may demand instead of compensation in kind the sum of money necessary to remedy the injury or repair the damage.

[75] S. Z. and Gen. v. Girma B and Z., German Supreme Court, January 25, 1924, 108 RGZ 58.

of breach not taken place."[76] Enforcement of specific performance is consequently even possible where the primary duty to fulfil the obligation has been transformed into a secondary duty of compensation (which in German law is not coterminous with damages).[77] Wherever there is a right to compensation, it means first of all a right to restitution in kind; moreover it means a right which can be demanded by both parties, by the promisee as well as the promisor. The right to claim restitution in kind is, however, restricted in several ways. The promisor may compensate the creditor in money, if the restitution in kind would require disproportionate expenses.[78] The promisee may demand money compensation where restitution in kind is no longer possible, or would be insufficient.[79] He may fix a reasonable period for restitution in kind and after the expiration of this time refuse to accept it and demand compensation in money.[80] In the case of injury to persons or damage to a thing, he may demand money instead of restitution in kind.[81]

Considering the claim to performance and the claim for compensation by way of restitution in kind as two forms of "specific performance" in German law, an important difference between them must be pointed out. The claim for performance can be enforced as long as the promisor is not discharged as a consequence of impossibility; restitution in kind, however, can only be claimed in the case of the promisor's fault (*Verschulden*).

The promisee's claim in case of nonperformance is normally (outlined above) to ask the court for judgment for performance of the contractual obligation (*condemnatio in ipsam rem*). It remains to explain how such judgment is executed. The German code of civil procedure (*Zivilprozessordnung*) contains a number of provisions governing the execution of judgments for specific performance.[82] The judgment for delivery of things

[76] S. R. v. W. I., German Supreme Court, November 27, 1940, 165 RGZ 260. In this case, a contract entitled plaintiff to join a partnership until a specified date and demand that it should be transferred into a limited partnership. His request to join was refused. The other partner, defendant, became unable to go on as a partner. Action was brought by plaintiff (1) to be declared entitled to take over the firm (as a partner which he ought to have been) and (2) to have the firm transferred to him. Judgment for plaintiff.

[77] The term compensation is perhaps not quite precise and is used here for the German term *Schadenersatz* which may mean compensation in kind and compensation by way of damages.

[78] Civil code §251 (2).

[79] Civil code §251 (1).

[80] Civil code §250.

[81] Civil code §249 (2).

[82] The Code of civil procedure, the *Zivilprozessordnung* of January 30, 1877 (the present amended text as published Sept. 20, 1950, in the *Bundesgesetzblatt* 533). The code is divided into ten books and contains 1048 articles. Book 8 contains a section dealing with execution to obtain delivery of things and to carry out acts and remedy omissions (articles 883–898).

is executed by the officer of the court attaching the chattels and handing them over to the creditor;[83] in the case of an immovable, the officer must evict the debtor and put the creditor in possession.[84]

Where the performance of the obligation consists in doing something, a distinction is made between acts which are not personal (*vertretbare Handlung*), acts which are personal (*unvertretbare Handlung*), and declarations (*Willenserklärung*). If the creditor refuses to do an act which can be performed by a third party, the former may, by way of execution, petition the court of first instance to have it done at the expense of the debtor,[85] and he may even seek to have the debtor advance the expenses. In deciding what acts can be performed by third parties, the practice of the courts is very liberal, and seems to exclude mainly acts where personal competence is essential or personal responsibility may be involved.[86] Where the act cannot be performed by others and depends exclusively on the promisor's power, the promisor may be induced or compelled, by the imposition of a fine or by ordering his confinement, to perform it.[87] This constraint must not be employed where the act ordered by the judgment is to marry, to restore conjugal community, or to perform a contract of service.[88] Where the promisor has been ordered to declare his consent or make other declarations, and has refused, by the mere fact that

[83] Code of Civ. proc. §883 (1). (Specified chattels) "If the debtor has to deliver an ascertained moveable object or a certain quantity of specified goods, the sheriff has to take them and hand them to the creditor." Section 884 (Fungible goods). "If the debtor has to deliver a certain quantity of unspecified goods or stock, §883 part (1) is applicable."

[84] Code of civ. proc. §885 (1). "If the debtor has to deliver, transfer or lease real property or a ship (evacuate) the sheriff can dispossess him and give possession to the creditor." Possession in the sense of this provision means actual possession, not ownership. Ownership over immoveables is acquired through registration in the land register which is an act dependent upon a declaration (of will) for which special provisions exist. (§894)

[85] Code of civ. proc. §887 (1). "If the debtor does not perform an obligation to do an act which can be performed by a third person, the creditor is to be empowered upon his motion by the court of first instance to do the act at the debtor's cost."

[86] The court's attitude may be illustrated by some examples: Acceptance of delivery of goods cannot be performed by others, because it requires the examination of the goods; setting up of balance sheets not possible, but rendering an abstract of accounts possible; demand for entry in the land register possible, entry of declaration of bankruptcy in commercial register not possible; intellectual work usually not possible, if special qualification required: e.g., writing of a scientific work, translation of a novel, but it is possible where average competence may be sufficient, e.g., compiling an index to a work, translation of a document; giving of security possible, signing of a bill of exchange not possible; to institute proceedings not possible, to release a mortgage possible. Comp. for many examples, Rosenberg: Lehrbuch des deutschen Zivilprozessrechts (6 ed. 1954) §208, p. 1008 ff.; Baumbach-Lauterbach: Zivilprozessordnung (22 ed. 1954) §887 note 6.

[87] Code of civil proc. §888. The amount of fine must be definite, but is unlimited; the time of confinement (prison) must not exceed six months.

[88] Code of civ. proc. §888 (2).

the judgment has become final the declaration is deemed to have been given, and the judgment may be used instead of the promisor's declaration.[89] Thus, it may be used before the land registry or other public registers for entries, conveyances, cancellations, and for other legal declarations, like powers of attorney, discharge of company directors, etc. These various modes of execution succeed fairly well in giving the judgment for specific performance practical effectiveness.[90]

The question that remains to be discussed is whether the creditor's claim for specific performance is a right binding upon the courts, or whether it is an alternative mode of enforcement of a contractual obligation left to their discretion. As already stated above, there is no doubt that specific performance is a right, and the courts generally cannot refuse to give judgment for specific performance if demanded, unless it is an impossibility.[91] Section 242 may furnish an exception to this rule, permitting the court to exercise discretion in determining whether the demand for specific enforcement has been made in good faith.[91a] However, the German courts are in this respect much more restricted than the French, and it could hardly be said that to decree specific performance is left to their discretion.

We may ask how far the claim for specific performance as a matter of right is also of practical effectiveness when it comes to execution of a judgment. Considering the number of cases in which the various modes of execution in German law provide a possibility of direct enforcement by attachment of chattels, by conveyance of real property on the production of the judgment, by performing or having performed by others an act at the expense of the promisor, or by using the judgment in lieu of the re-

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[89] Code of civ. proc. §894. Some doubts exist as to the effectiveness of §894, when a declaration must be made to a third party, e.g., in case of giving notice, or making a disclaimer, etc. In such cases, the declaration may not be deemed to be given by the judgment itself, but the final judgment must first be transmitted to the third party or the defendant coerced by fines (§888) to render the required declaration. Comp. Dilcher, H.: "Die Vollstreckung der Abgabe einer Willenserklärung," 67 Zeitschrift für Zivilprozess (1954) 210–228.

[90] The modes of execution where the defendant is condemned to pay money are the following: personal property in the hands of the debtor is attached, sold by public auction and the proceeds paid to the creditor up to the amount due. Choses in action or other personal property, which are in the hands of third parties are attached by judicial order forbidding the debtor and the garnishee to dispose of them, and where the debtor's right is not denied the bailiff disposes of them as in the case of other personal property. The execution against real property is made by registration of a lien, by sequestration, or by public auction under judicial supervision.

[91] A. von Tuhr: "Naturalherstellung und Geldersatz," 46 Iherings Jahrbücher (1904) 39.

[91a] Section 242 provides that the debtor is bound to effect preformance according to the requirements of good faith. This rule has been turned into a principle of "equity" by interpretation of the courts.

quired declaration, there remain only very exceptional cases where the judgment for specific performance becomes ineffectual. Especially one has to consider that the field in which specific performance in German law is available is much wider than the field of specific performance in Anglo-American law, which is more restricted.[92] Anglo-American law has, however, one very effective means to enforce its decrees of specific performance, the contempt device, in comparison to which the rarely used imposition of fine or the ordering of confinement in German law seems to be very ineffective. However, the courts in Anglo-American legal systems generally are very reluctant to order attachment for nonperformance of a decree of specific performance,[93] and have indeed little opportunity to do so in consequence of the use of remedies *in rem*.[94] It would, however, be a misguided use of comparison to go beyond the conceptual and functional comparison and evaluate the comparative effectiveness of devices in different legal systems without making a very broad study of them which would go beyond the scope of this paper.[95]

IV. Swiss Law

The right to demand specific performance in case of a breach of contract in Swiss law is governed by principles similar to those of German law. The rules are somewhat simpler, although the basic principle, namely, that the creditor has a right to claim enforcement of the performance, is not clearly stated.[96] The promisee may sue for specific performance as long as it has not become impossible; only where specific performance has become impossible may he claim damages for nonperformance. This latter claim is not an alternative claim, but a substitute for performance which has become impossible; he may not freely choose whether to demand one or the other, but is bound to claim performance. If he sues for damages while specific performance is still possible, his claim will be dismissed.[97]

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[92] In view of the restrictive effect of the general principles in granting or refusing specific performance, as mentioned above, the field for the application is further restricted.

[93] They may be so inclined where the defendant's fraudulent behavior is obvious.

[94] The situation would probably be different in cases of negative obligations where attachment for nonperformance of an injunction may be of much greater importance.

[95] Such comparison would require the consideration of the legal and business *mores* of the public, the length of litigation because of cumbersome procedural rules and complicated rules of evidence, the court fees, the fees charged by the attorneys (which may be prohibitive) etc.

[96] Comp. *supra* notes 26 and 27. The older Code of Obligations still provided (§111) that nonperformance, where the debtor is liable, resolves itself into a claim of damages. This formulation was omitted in the present code.

[97] In the case of Singer v. Spörri, Swiss Supreme Court, June 16, 1916, 42 Entscheidungen

This principle, however, will not be rigidly applied and the courts have introduced a number of important exceptions. Thus, there are contractual obligations which cannot be reasonably expected to be enforced specifically, e.g., the buyer's duty to accept the goods or the promisor's duty to make use of a loan (in a contract of loan). Other exceptions derive from the code itself; e.g., there are contracts where the code provides for compensation only, such as a contract for piece-work, if the employee does not receive an adequate quantity of work.[98] The court may, under certain circumstances, limit the right of specific performance, if its enforcement would result in a loss to the promisor out of proportion to the injury caused by his nonperformance, or if it would otherwise be contrary to good faith.[99] Breach of secondary duties arising from a contract may result in a claim for damages only.[100] The right to claim specific performance (*Realerfüllung*) can be excluded by the contract and liquidated damages provided for nonperformance.[101] Apart from these exceptions, damages may only be sought for breach where the contract cannot be or cannot properly be specifically performed.[102]

The specific performance of an obligation to do something may be enforced by fulfilling the obligation, at the expense of the promisor, by the

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des Bundesgerichts (hereinafter BGE) 239, plaintiff sued for damages for breach of a contract of sale. The claim was dismissed because plaintiff did not fix a date for delivery (according to section 107 of the Code of obligations) nor was the transaction one where time was essential and consequently only an action for specific performance and not an action for damages could have been instituted. "... The consequence of the omission of fixing the date for delivery was that plaintiff had *only the ordinary claim* of a purchaser, namely, that of *specific performance* of the purchased threads, and that consequently he could not disclaim subsequent performance and put forward his claim for damages instead ..." (emphasis supplied)—Note: Code of obligations §107: "Where in the case of bilateral contracts a debtor is in default, the creditor is entitled to give him a reasonable time limit for subsequent performance or to have such time limit fixed by competent authorities. In default of performance within such time limit, the creditor may still sue for performance and damages for delay, but in lieu thereof, he may, if he gives immediate notice to that effect, forego subsequent performance, and at his option, either claim damages for nonperformance or withdraw from the contract." For withdrawal, comp. C. Szladits: "Discharge of Contract by Breach in Civil Law," 2 Am. Jour. Comp. L. (1953) 334 ff.

[98] Code of obligations §331.

[99] von Tuhr/Siegwart: Allgemeiner Teil des schweizerischen Obligationenrechts (1944) (hereinafter von Tuhr/Siegwart) §67. II. p. 527; Becker: Kommentar zum Schweiz. Zivilrecht (Gmür. Kommentar) (2 ed. 1940) (hereinafter: Becker). Art. 97, Nos. 102–104.

[100] Métropole v. Grisel, Swiss Supreme Court, April 26, 1890. 16 BGE 378. By secondary duties are meant duties which are not the principal obligation of a contract. E.g., in a contract of insurance the premature ending of the contract is a breach of a secondary duty, as against the principal duty to pay 10,000 frcs. in case of loss (if that would have been refused on occurrence of a loss).

[101] Von Tuhr/Siegwart, *ibid.*; Becker, Art. 97, No. 105.

[102] Code of obligations §97.

creditor himself, or with the help of a third party.[103] In such cases, the promisee must sue for performance and obtain a judgment authorizing him or a third party to perform the necessary acts; he may also demand the advance of the necessary expenses from the promisor. This provision is applicable only where the obligation consists of acts which can be performed by others and which are not personal.[104] These provisions of section 98 are not the enforcement of a claim for damages, but of an obligation of specific performance. They seem to be applicable, therefore, although nonperformance is not due to the fault of the promisor.[105]

Where the contractual obligation consists in forbearance, the promisee may, in case of its breach, demand that the state of affairs created by the breach be remedied; he may even seek authorization to undertake this himself at the expense of the promisor.[106] The most frequent proceeding in this case is an action for restitution of the previous state of things, if possible.[107]

Where the promisor's obligation is to make a declaration in order to bring about legal effects, no general rule seems to exist which would provide as in German law that the judgment take the place of such declaration.[108] Such a result occurs in specific cases, namely, in the case of assignments[109] and of the transfer (conveyance) of land.[110]

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[103] Code of obligations §98.

[104] This authorization may include power to acquire a thing in possession of a third party which the promisor was obligated to acquire for the promisee. Thus, where the seller is not the owner of the goods sold, and consequently they cannot be taken from him by way of attachment, the buyer may apply for an authorization, under §98, to purchase the thing from the actual owner at the expense of the promisor, if he prefers this to a purchase in the open market or damages. In this respect, Swiss law goes further than German law where authorization by the courts under ZPO §887 (3) to performance by the promisee himself at the promisor's expense is not possible if the obligation consists in the delivery of goods and they are not directly attachable because not in the promisor's possession. Comp. Tuhr/Siegwart §67.IV and note 58.

[105] v. Tuhr/Siegwart §67 IV; Oser-Schönenberger: Kommentar V. 1. (1929) Art. 98 No. 9; Becker: N. 1. Art. 98 No. 8. If it were a form of damages, the fault of the promisor would be a prerequisite for the application of §98.

[106] Code of obligations §98 (3). He may claim damages if the breach cannot be remedied specifically. Code. Obl. §98 (2).

[107] S. König v. Minerol, A. G., Swiss Supreme Court, January 21, 1930, 56 BGE II.50; Becker VI.1, Art, 98 Note 13–14.

[108] The legal effect of such a judgment is a matter of some discussion. Von Tuhr maintains that a general rule can be deduced according to which a judgment ordering performance will bring about legal changes otherwise attainable by declaration of the promisor (v. Tuhr/Siegwart §67.III). The views of the following commentators are contrary: Oser-Schönenberger Art. 98 No. 7; Pfenninger, Hans: Die Realexekution im schweizerischen Recht (1924, Zürich) 107 ff.

[109] An assignment is valid only if a written declaration of assignment is given by the assignor, but a contract promising the assignment is valid without formal requirements.

The mode of execution of judgments for specific performance is regulated by the federal executions and bankruptcy law and the federal and cantonal rules of procedure.[111] In most cases, rules as to the execution of a judgment for specific performance are left to the cantonal law and vary according to the procedural rules of the cantons. Where the judgment is for the delivery of a specific thing, execution usually consists in the officer of the court attaching it and handing it over to the creditor.[112] The ownership of land is acquired by a final judgment[113] and transfer in the register may be made under it.[114] Where the judgment orders the debtor to do something, or to forbear from doing something, he may be constrained by imposition of fines or imprisonment.[115] In some cantons, refusal to comply with a judgment is considered a criminal act. If specific execution is not successful, the creditor may sue for damages. The execution of a judgment for damages is made according to the federal law,[116] and is usually carried out by attachment of property.

V. Comparison

Contrasting the specific performance of Anglo-American law with the specific enforcement of civil law systems, there is a fundamental difference in the theory of the two institutions: in Anglo-American law it is an extraordinary remedy at the discretion of the court, while in civil law it is the assertion of the promisee's "absolute" right arising from the con-

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In enforcing the latter, the judgment will render the transfer effective. Civil code §166. "Where the transfer of choses in action is effected by operation of law or by judgment, the transfer is effective as against third persons, independent of any formality of the former creditor."

[110] Registration in the land register is required for the acquisition of ownership of land. Civ. code §656 (1). Civ. code §665 (1): "Where a person acquired a good title to the ownership of property, he has a right *in personam* against the owner for the registration of his title and, if the latter refuses, is entitled to apply to the court for the establishment of his rights of ownership." Entries are made in the register on a written statement by the owner of the property to which the purported transaction refers. Civ. code §963 (1). *Such statement is not required* where the party acquiring the property can base his application on a statutory provision *or a valid judgment of the court* or equally valid title.

[111] Code of obligations §97 (2).

[112] Pfenninger, *op cit.*, 69 ff.; Civ. procedure of Kanton Zürich §375; Civ. proc. of Kanton Bern §406.

[113] Civ. code §656.

[114] Civ. code §665.

[115] Civil procedure of Zürich §292/3 and 375; of Tessin §544; of St. Gallen §389/90 and 456. In the Canton of Geneva, the French device of "*astreinte*" is also applied. Comp. Pfenninger, *op. cit.*, 98 ff. For "*astreinte*" comp. note 47 *supra*.

[116] The Bundesgesetz über Schuldbetreibung and Konkurs (SchKG) of April 11, 1189 (which was revised several times) provides for execution of money debts by way of attachment and sale of the attached property (sec. 38).

tract. In civil law, the promisee's primary right continues unaffected by the promisor's breach of contract. This fundamental difference has far-reaching consequences, even considered from the functional angle, in spite of the fact that specific performance in Anglo-American law is decreed in many—one might be tempt to say in most—of the really important cases, and that the discretionary character of this device is much more limited than the various formulations of the rule may indicate.

This discretionary character of specific performance is more strongly emphasized in English law[117] than in American law, where the modern tendency seems to be to consider its grant a matter of course or right.[118] It is, however, a discretion to be exercised according to fixed and settled rules,[119] a matter of discretion, not arbitrary, but judicial.[120] But even where specific performance is granted as a matter of course, the con-

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[117] Specific performance of contracts is generally considered a discretionary remedy. Fry, Sir Edward: Specific performance of contracts, 6 ed. (1921) 19: "It [specific performance] is said to be in the discretion of the Court. The meaning of this proposition is not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, but . . . that the mere fact of existence of a valid contract is not conclusive in the plaintiff's favour." "I think it must always upon a bill for specific performance be in the discretion of the court to decree it or leave it at law." per Eyre, Lord Commissioner Cooper v. Denne, Denne v. Cooper (1792) 1. Ves. 565; 30. E. R. 491. "The extraordinary remedy by specific performance is always more or less open to discretion" per Lindley, L. J. in Re Scott and Alvarez's Contract [1895] 2 Ch. 603. Although Maitland said: "On the whole I think that we may say that specific performance applied to agreements for the sale or the lease of lands as a matter of course; its application outside these limits is somewhat exceptional and discretionary." (Equity 304), this statement must be taken with qualifications. Comp. Holliday v. Lockwood [1917] 2 Ch. 47, at 56 and 57.

[118] The mere fact that a contract has been breached does not give a right to specific performance, Jamison Coal and Coke Co. v. Goltra (CCA 8th, 1944) 143 F. 2d 889, 154 ALR 1191. However, "As a general rule it may be said that when the party seeking specific performance of a contract establishes the existence of a valid binding contract which is definite and certain in its terms and contains the requisite of mutuality of obligations and is one which is free from unfairness, fraud, or overreaching, and enforceable without injustice upon the party against whom enforcement is sought, the court will, when the remedy at law for the breach of such contract is inadequate and the enforcement of specific performance will not be inequitable, oppressive or unconscionable, or result in undue hardship, grant a specific performance as a matter of course or right." 49 Am. Jur. p. 17. See also 65 A.L.R. 25–28. The above statement from Am. Jur. contains so many provisos that the discretionary character may still be easily discerned. "It has been held that the remedy [of specific performance] is discretionary even with respect to contracts in which the remedy is ordinarily invoked (Gibb v. Mintline, 141 N. W. 538, 175 Mich. 626) and even though a legal right of damages for a breach of contract may exist." 81, C.J.S. Specific performance §9. p. 421. Comp. also Walsh, *op. cit.*, §58.

[119] Haywood v. Cope (1858) 25 Beav. 140; 53 E. R. 589.

[120] White v. Damon (1802), 7 Ves. 30, 34; 32 ER 13, L.C.

ditions required for its being granted are numerous.[121] In view of the various fetters put upon the courts' discretion in Anglo-American law, it may be pointed out with justification that even in the civil law systems the absolute right of the promisee is severely limited by the discretion given to their courts in deciding whether specific performance should be granted, a discretionary power especially jealously guarded by the French courts. However, this apparent similarity is misleading. The salient feature which separates the two systems from the practical standpoint is the requirement in Anglo-American law that the remedy at law (damages) for breach should be inadequate.[122] The mandatory rule in civil law, especially in German and Swiss law, is that compensation (damages) must not be granted while performance *in specie* is possible. This is just the opposite of the Anglo-American approach.[123] To sum up, in Anglo-American law, the breach of contract gives a right to claim damages, and may give a right to specific performance; in German-Swiss law it gives (or rather, maintains) the right to demand performance (*in specie*)[124] and exludes the right to claim damages as long as specific performance is possible.[125]

[121] The grant of specific performance is conditional on the fairness of the contract, on the "clean hands" of the petitioner, but besides there are the general principles regulating the granting or refusal of it, as mentioned earlier. Comp. p. 209 *et seq.*

[122] Walsh, *op. cit.* §§58–63; Fry, *op. cit.* Chap. IV.iii; Pomeroy, J. N.: 4 Equity Jurisprudence (5 ed. 1941) §1401.

[123] French law is in this respect in a different position and analogous to Anglo-American law, as there is no mandatory requirement to sue for specific performance, if the promisee prefers damages. He has an alternative remedy.

[124] Not, however, where the exceptions discussed earlier exist.

[125] The difference between the Anglo-American and civil law as to the right of specific performance was well explained by Lord Watson contrasting English law to Scots law: "The two countries regard the right of specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim of damages; specific performance is not a matter of right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland the breach of a contract for the sale of a specific subject such as landed estate, gives the party aggrieved the legal right to sue for implement, and, although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shown to be impossible, in which case, *loco facti imprestabilis subit damnum et interesse.* Even where implement is possible, I do not doubt that the Court of Session has inherent power to refuse legal remedy upon equitable grounds, although I know of no instance in which it has done so." Stewart v. Kennedy [1890] 15 App. Cas. 75, 102. The right of specific implement (specific performance) is the general rule in Scots law. Comp. Gloag and Henderson: Introduction to the law of Scotland (5 ed. 1952) p. 117.

In South African (Roman-Dutch) law a plaintiff has a right to claim specific performance, subject to the discretion of the court to refuse it. Comp. Lee: Introduction to Roman-Dutch law (5 ed. 1953) p. 267; Haynes v. Kingwilliamstown Municipality, 1951 (2) S. A. 371, 378 (A.D.)

There may be a difference as respects the sphere in which specific performance is granted in Anglo-American law, and in which a contract is specifically enforceable in civil law. This does not seem to be very important, once the basic differences of principle have been considered, especially because there are more and more exceptional cases in which specific performance is granted in Anglo-American law.[126]

There are differences in this field among the civil law systems, but these are not fundamental, although of some importance. In German and Swiss law specific performance is mandatory as long as it is possible; in French law it is an alternative right at the choice of the promisee.[127] In French and Swiss law, where specific performance is not possible, the promisee can claim damages; while in German law damages are still preceded by a claim to compensation by restitution in kind.[128]

In French, German, and Swiss law, the promisee may be authorized to do himself what has to be done under the contract at the expense of the promisor. Where a declaration of intention is to be made, this can be replaced by the judgment of the court; it seems, however, that in Swiss law this rule is much narrower than in French or German law, and is restricted to assignments and to the transfer of land. In the field of execution there seems to be a considerable similarity among the three legal systems.

In spite of these variations, the three civil law systems all consider the specific enforcement as the apex of the contractual obligation and by this are fundamentally divided from the specific performance of Anglo-American law, which in spite of its ever-widening utilization remains a supplementary remedial device.

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[126] Walsh, *op. cit.*, §58, p. 300; Pomeroy, *op. cit.*, §1402.

[127] In case of breach of contract, the injured party may elect to claim specific performance or damages (sec. 1184 c. Civ.). Such party may change his election as many times as he wants, until judgment is handed down. Sté. Isobloc v. Sté. Tubante, Cour de Cassation, March 31, 1952 [1952] Sirey C. 49.

[128] It must, however, be pointed out that this latter difference is in most of the cases of theoretical rather than of practical importance.

Comments

THE CONTRACT OF SALE IN SELF-SERVICE STORES

While in Germany during last summer, I read an article in one of their legal journals on the contract of sale in self-service stores.[1] On my return to Northern Ireland, the first legal writing I happened to read was on the same subject. It was a comment[2] by my colleague, D. C. Williams, on *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists*.[3] I found these articles interesting illustrations of the German and English approaches to identical problems. This note also contains an English approach to the problem of when a contract of sale is concluded in a self-service store.

It may be helpful to give a brief resumé of the English case. The facts which appear in the report are these.[4] The defendants were owners of pharmacies against whom the plaintiffs brought an action for a declaration that a breach of the Pharmacy and Poisons Act, 1933, had been committed. Under that Act, it is not lawful for prescribed poisons to be sold unless the sale is effected by, or under the supervision of, a registered pharmacist. The declaration sought was to the effect that offences were committed when customers bought at one of the defendants' shops two bottles of medicine containing small amounts of prescribed poisons. The particular shop was conducted as an ordinary self-service store, but with a registered pharmacist on duty at the cash desk. Customers had open access to shelves on which medicines and other commodities were set out. The customers brought their selected goods to the cash desk where they paid for them the amount specified by the cashier. The pharmacist present at the cash desk saw the goods bought by the customer and had power to prevent any customer from removing any drugs from the premises. The contention of the plaintiffs was that the sales were complete before the customer took the medicine to the cash desk: the contention of the defendants was that the sale was not "effected" until the customer arrived at the desk where it was effected under the supervision of a registered pharmacist. In the Queen's Bench Division, Lord Goddard L.C.J. refused the declaration, holding that "There was no sale until the buyer's offer to buy was accepted by the acceptance of the purchase price, and that took place under the supervision of a pharmacist,"[5] i.e., at the cash desk. The reasoning of the Lord Chief

[1] Otto C. Carlsson, "Nochmals 'Kaufabschluss in Selbstbedienungsladen,'" JR, 1954, p. 253.

[2] 10 N.I.L.Q. (1953) 117.

[3] [1953] 1 Q.B. 401; [1952] 2 All E.R. 456 (Q.B.D.); [1953] 1 All E.R. 482 (C.A.).

[4] The background to the case is that the plaintiffs were the professional association of pharmacists concerned to see that the employment of pharmacists is not diminished. The self-service system reduces the number of registered pharmacists involved in the sale of drugs. The defendants were the owners of a large chain-stores organization whose shops sell pharmaceutical goods.

[5] [1952] 2 All E.R. at 459B.

Justice, as well as his decision, was approved in the Court of Appeal. Indeed the judgments there largely restated or cited the words of Lord Goddard. Somervell L.J. stressed the point that there was no sufficient difference between the modes of conducting transactions in an ordinary shop and in a self-service store for the law to distinguish between contracts of sale in them.[6]

The object of Dr. Carlsson's article is, of course, different from that of Mr. Williams' note, and this to some extent accounts for their difference of treatment. It is, nevertheless, noteworthy that Dr. Carlsson does not cite the decision of any German, or indeed European, judicial tribunal. Eight-ninths of his article is devoted to a juristic consideration of the problem, in the course of which his references are to two previous articles in German journals[7] on the same subject, and to the views of four commentators on the German Civil Code:[8] there are also three mentions of paragraphs in the code.[9] The remaining one-ninth of the article consists in a brief discussion of United States case law, which he considers to be of special value because of the many years' experience which the United States has had of self-service stores.[10] Mr. Williams gives a brief account of the case which he is "noting," and adds a brief comment, accepting the court's conclusion but rejecting its reasoning. According to Lord Goddard L.C.J. and the Court of Appeal, it is the customer who makes an offer: Mr. Williams prefers to say that the store owner makes the offer, which, however, is not accepted by the customer until he produces the goods to the cashier.

The possibility that the analysis supported by Mr. Williams is correct is considered by Dr. Carlsson, but he states that he prefers the analysis according to which the offer is made by the customer. His main concern is not to decide between these two doctrines, but between two different doctrines concerned with the point of time when the contract is made. According to the one thesis, the contract is made "when the purchaser places the goods in the carrier and it is clear that he has turned to the selection of other goods."[11] The other thesis contends that the contract is made at the cash desk.[12] Dr. Carlsson supports the latter thesis. The former thesis, he considers, lays down a rule which is too vague to be practical, and which is also unrealistic. The nature of a self-service store makes it clear, he considers, that neither the customer nor the shopkeeper is contractually bound until the goods are paid for at the cash desk. A rule of law should correspond with social realities, and, moreover, the rule which he favors is in the interests of both storeowner and customer. The store owner is interested in selling the maximum amount of goods, and psychological

[6] See [1953] 1 All E.R. at 483 H; and per Lord Goddard C.J. [1952] 2 All E.R. at 458F.

[7] Recke: NJW, 1953, p. 91; Bögner: JR, 1953, p. 417.

[8] See n. 13 *infra*.

[9] Art. 158 and Arts. 823 ff. (twice).

[10] He makes specific reference to Lasky v. Economic Stores (1946) 319 Mass. 224 and Gargaro v. Kroger Grocery & Bakery Co. (1938) 22 Tenn. App. 70.

[11] Bögner: JR, 1953, p. 417.

[12] Recke: NJW, 1953, p. 91.

studies have shown that a customer who can freely handle goods is very likely to buy them. There would be far less sales if the law were that the customer was bound to buy goods which he had taken from the shelves. Romer L.J. expressed the same point of view when he said "If that were the position in this and similar shops, and that was known to the general public, I should imagine the popularity of such shops would wane a good deal." Dr. Carlsson contends that not only has the customer freedom to change his mind after selecting an article, but that also the shopkeeper may do so. He lays stress on the fact that the customer has to place the selected goods in the carrier provided by the shop and take the carrier with the goods to the cash desk. The customer is not entitled to put the goods into his pocket. Control of the goods remains with the shopkeeper.

Dr. Carlsson points out that two different analyses may lead to the view that the contract is made at the cash desk. The one he prefers is derived from the general principle that it is the customer in a shop who makes an offer to the shopkeeper.[13] Applying this general principle to self-service stores, he says that the customer makes the offer when he places the goods in the container provided by the shop, and continues to make it so long as he keeps the goods in the container. This is in accordance with the dictum of Lord Goddard L.C.J.—"the mere fact that a customer picks up a bottle of medicine from the shelf . . . is an offer by the customer to buy." Nevertheless, I think it more realistic to say that the customer has not passed beyond the stage of preliminary negotiation until the goods are taken to the cash desk. This is the view of Somervell L.J., who described a self-service store as "a convenient method of enabling customers to see what there is for sale, to choose, and, possibly, to put back and substitute, articles which they wish to have, and then to go to the cashier and offer to buy what they have chosen."

Dr. Carlsson points out that there are German jurists who consider that in all circumstances where goods are displayed with marked prices there is an offer by the vendor. Applying this principle to self-service stores, he contends, that the customer who takes the goods from shelves "accepts" the offer subject to a condition that he will not put the goods back.[14] There is no complete acceptance until the goods are taken to the cash desk. This is the doctrine supported by Mr. Williams.[15]

In my view, the better opinion is that which treats the customer as making the offer when tendering the goods at the cash desk. This makes it possible for the shopkeeper to reject the offer in all cases, and not merely in cases like the

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[13] He cites as authority the views of two commentators, Von Oertmann and Soergel, and of the editors of the RGR-Kommentar. The contrary view that the display of goods with a marked price constitutes an offer by the vendor is held by two other commentators on the B.G.B.—von Staudinger and Palandt.

[14] In English law, of course, acceptance must be unconditional.

[15] He cites Wiles v. Maddison [1943] 1 All E.R. 315, but it is difficult to regard that case as being concerned with more than the interpretation of a wartime price regulation order.

Pharmaceutical Society case, where there is a sale of drugs and the pharmacist supervising the cashier is "authorised to prevent a customer from removing drugs from the premises." According to the analysis of Mr. Williams, the customer could insist on purchasing the goods at the marked price, except perhaps where he was aware that a mistake had been made. One of the arguments which has been put forward for saying that display of goods at marked prices only amounts to an invitation to treat is that it is unfair to hold the vendor to a mistake in the pricing. In a self-service store, it is not inconceivable for the cards displaying the prices to get mixed by the actions of customers.

It is valuable to consider under what logical category the judgment as to the nature of the transaction falls. Is it a mere question of fact? Is it necessary merely to consider the factual character of the circumstances and proceedings in a self-service store in order to decide by whom and when the offer or acceptance is made? Or is a policy judgment, a judgment of value involved? The judgments in the *Pharmaceutical Society* case consider questions of value. Thus, Lord Goddard L.C.J. says "One has to apply common sense and the ordinary principles of commerce in this matter. If one were to hold that in the case of self-service shops the contract was complete directly the purchaser picked up the article, serious consequences might result." The reason why value judgments are involved is the following. The question whether an offer or acceptance is made does not depend on the actual state of mind of the particular shopkeeper or customer: the question is one of objective not of subjective intention. It is whether an offer or an acceptance has been reasonably manifested. Would a reasonable man have thought there was an offer or an acceptance? The character of the reasonable man in contract has not been precisely determined. Either he is a logical construct, a statistical creature, like the "average taxpayer," "the normal household," or he is the man who acts reasonably, i.e. in such a manner as to do justice. In the first case, his reaction is a matter of conjecture, and the judges' view of justice can properly be brought into the balance where conjecture alone yields no decision. In the second case, the criterion involves an immediate use of the sense of justice. In either case, therefore, the rules as to offer and acceptance and the completion of a contract in the case of self-service store transactions, as in other transactions, involve considerations of justice.

The various factors to be taken into account include the public interest in self-service stores as well as the just regulation of the relations between shopkeeper and customer. Dr. Carlsson in his article dogmatically asserts that the rules of law which German judges have to construct, because specific provision for self-service stores is not to be found in the BGB, should not obstruct or hamper the development of the new sales system. A common sense judgment of economics suggests that it is in the public interest to encourage, or at any rate not to hinder, the development of self-service stores because they lower the costs of distribution of goods. There was, however, a clash of interests in the *Pharmaceutical Society* case between, on the one hand, the store-owners'

interest in minimising costs of distribution in order to some extent to increase profits, combined with the interest of the general public in keeping prices low, and, on the other hand, the interests of pharmacists to see that they are employed in the distribution of pharmaceutical goods, an interest which to some extent subserves the public interest of protection against improper distribution of dangerous goods. The judgments in the case, however, were confined to considerations of the relations of the individual interests of shopkeeper and customer.

Consideration has already been given to some of these interests. There have already been discussed the interests of freedom of choice of the customer and of control of the goods and prices by the shopkeeper. Problems of loss or damage to the goods and to the customer also call for a solution. In *Lasky* v. *Economic Grocery Stores*,[16] a customer was injured by the explosion of a bottle of mineral water that she had taken from the shelf in a self-service store. A claim in contract was rejected. The court said "It is plain upon the plaintiff's own testimony that it was optional with her to return the article she selected or to keep it and later become the purchaser." Clearly, the court treated the question as one of fact. In the opinion of the court, moreover, there was no contract until the goods were taken to the cash desk.

Mr. Williams concludes his note by hoping that the House of Lords will one day decide that a display of goods in a shop may, in certain circumstances, be an offer. Does the *Pharmaceutical Society* case decide that the display of goods in a self-service store is not an offer? Are the dicta to that effect *obiter dictum* or *ratio decidendi*? I think they are *ratio decidendi*, but I am not sure. What is clear, however, is that English textbook writers now have "clear" authority for their proposition that a display of goods in a shop amounts merely to an invitation to treat.

J. L. MONTROSE*

[16] *Supra* n. 10. My reading has been confined to the very brief statement in Dr. Carlsson's article.

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NEW LEGISLATION

GUATEMALA: COPYRIGHT—A new Copyright Act was enacted February 11, 1954 (Official Gazette "El Guatemalteco" No. 76, February 19, 1954). The author's rights recognized by the law are conferred without any requirement of deposit, registry, or other formality (art. 1), but cannot be availed of for profit without prior authorization, and payment of dues, to the Guatemalan Association of Authors and Composers (arts. 22, 32). The copyright is good until 50 years after the death of the author or 50 years after publication in the case of a juristic person (art. 13). The author's "moral" rights are protected.

The law protects only nationals or domiciled aliens; other foreigners are accorded the protection given by treaties and conventions to which Guatemala is a party, and specifically the Inter-American Convention.

HONDURAS: CO-OPERATIVES—Co-operative Societies are regulated by Decree No. 158 of March 13, 1954 (Official Gazette, No. 15,268, April 13, 1954). A new administrative bureau (*Dirección de Fomento Cooperativo*) is created (Title II) to promote the organization of co-operatives, with ample powers of supervision.

DOMINICAN REPUBLIC: INSURANCE COMPANIES—Law No. 3788 of March 19, 1954 (Official Gazette No. 7672, March 24, 1954) regulates insurance companies, repealing all prior enactments. It is far more liberal in its treatment of foreign companies than other Latin-American countries. They are subject to no greater requirements than national companies for authority to do business, except that they must present to the Superintendent of Insurance, the powers of attorney conferred on their agents and a certified copy of the resolution of the company authorizing business in Santo Domingo; policies must be in Spanish (art. 5). Foreign life insurance companies must invest in the Republic 50% of their reserves (for policies written in the country); foreign companies engaged in other forms of insurance must so invest 30% to 40% of their premiums. Domestic companies must invest all their capital and premiums in the country. The authorized investments are the same for both domestic and foreign companies. Policies may be written abroad covering risks in the Republic, but are subject to the same tax (3% or 4%) (art. 20). Non-domiciled companies may be authorized by the Superintendent of Insurance to write policies when it is impossible to effect insurance with domiciled companies (art. 32) and foreign companies may obtain special exemption from the normal requirements of the law upon proof that their home laws make compliance impossible, subject to a tax of 10% (art. 37).

CUBA: SHIP MORTGAGES—The Spanish Code of Commerce of 1885, in force in Cuba, contained no specific provision for ship mortgages. The defect is supplied by Decree-Law No. 1420 of May 12, 1954 (Official Gazette, Extraordinary No. 15, May 13, 1954); amended as to one article by Decree-Law No. 1559, August 4, 1954 (Official Gazette, Extraordinary No. 29, August 5, 1954). The mortgage must be recorded in the Mercantile Registry of the vessel's home port (art. 10). If executed abroad, a certified copy of the instrument must be presented for such recording (art. 11). The mortage is subordinated to port dues, taxes, and various enumerated maritime liens and priorities (arts. 18 seq.). The mortage must contain an express submission to Cuban courts and a waiver of any other forum and if either the creditor or the owner be a foreigner, a waiver of all claims against the Cuban State (art. 21). Article 24 permits ownership of vessels by foreigners or foreign companies, but the provisions above sum-

marized and others render it doubtful whether the decree will prove attractive in practice.

P. J. EDER*

* Board of Editors.

DECISIONS

ISRAEL: DEVALUATION OF CURRENCY—The editor of this Journal recently received a translation of a decision rendered by an Israeli Judge, Witkon J., sitting in the District Court of Jerusalem, which, it was thought, might be of interest for American readers: *Braude v. Palestine Corporation Ltd.*, decided on April 4, 1954. Even though it must be doubtful whether this expectation is justified, it may not be wholly out of place to comment shortly on what can only be described as a freakish case.

The defendant company was formed in Jerusalem in 1922 with a capital of £200.000. When the capital was increased in and after 1935, the respective resolutions invariably referred to the increased capital as expressed in "pounds sterling." The question was whether the capital continued to be so expressed after the establishment of the State of Israel in 1948 and after the devaluation of the Israeli currency in 1952, when the rate became £1 sterling for £I 2.800. The Judge gave an affirmative answer with the result that the capital of the company which carries on business in Israel and the assets of which are, of course, valued in Israeli currency, was suddenly almost trebled in terms of Israeli currency. This is an astonishing consequence which is contrary to the principles of company law as universally understood and also to the principles of monetary law. In *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122,150, Lord Wright treated it as axiomatic that the capital of a company must be expressed in the currency of the country to which the company belongs: "as the appellant company was registered in England, it is clear that its capital must be fixed in British sterling."

In the case before him (the facts of which have been considerably simplified here), Witkon J. reasoned as follows: In 1922 there did not exist an independent Palestinian currency, but "the pound which was legal tender in Palestine during that period and to which the character '£' referred was the pound sterling and no other." Hence the company's original capital was expressed in English sterling. In 1927 the Palestine pound was introduced, but on the true construction of the Palestine Currency Order, 1927, this did not involve the conversion of the capital expressed in £ sterling into £P and left it open to parties to contract with reference to foreign currency. When increasing its capital in 1935 and subsequent years, the company exercised this power by expressly referring in each resolution to "pounds sterling" being the currency of the increased capital. The introduction of the Israeli pound in 1948 was immaterial. All that the Judge said on the significance of that event was: "Need-

less to add that also the Israeli Currency Law of 1948 did not change the position."

The last-mentioned conclusion, in particular, seemed to be opposed to every experience gathered in the course of territorial changes (on which see Mann, *The Legal Aspect of Money* (2nd ed., 1953) pp. 214 *seq.*). A translation of s.2 of the Israeli Currency Ordinance of August 17, 1948, kindly supplied by the Israeli Ministry of Justice, reads as follows:

> Wherever for any purpose, in the past or in the future, a reference to a pound or Palestine pound or Lirah Eretz Israelith or Lirah E.I. or L.P. or Lirah is, or has been made, in writing or orally or impliedly, such reference shall be deemed to be a reference to an Israel pound, unless the provisions hereof are expressly excluded.

One should have thought that this provision (which follows the type of enactment usually made in the event of territorial changes) converted the denomination of the capital of an Israeli company from £ sterling into £I. Why did the learned Judge not take this view? Did he think that s.2 required so narrow a construction as to impose the conclusion that the reference to "a pound" did not include a reference to "a pound sterling"? Or did he think that, by referring to £ sterling at various dates before 1948, "the provisions hereof," i.e. of the Ordinance, had been, and could be, excluded in advance by the parties? It is impossible to find the answers to these questions. In the absence of any explanation by the learned Judge or by an Israeli lawyer to whom, for all we know, the point may be free from doubt, this writer ventures to think that a realistic interpretation of s.2 would have supplied the obvious solution of a problem which, as monetary history shows, is by no means unique.

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AUSTRIA: NATIONALIZATION OF FOREIGN JOINT STOCK CORPORATIONS IN COUNTRY OF REGISTRY; NO EFFECT ON ASSETS LOCATED ABROAD—The problem, what effect, if any, should be given to confiscatory decrees of foreign governments was not altogether unknown prior to World War I.[1] However, the classic British, French, and United States cases are concerned with the effects of the Soviet Russian decrees issued after World War I.[2] As there was hardly any Russian property to be found in Austria after World War I, Austria's contribution to solving the many complicated issues raised by these confisca-

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[1] E.g., Folliot v. Ogden (1789) 1 H.Bl. 123, arising out of the American War of Independence; Baglin v. Cusenier, 221 U.S. 580 (1911) arising out of a French decree of 1901, dissolving religious orders (Chartreuse case); Ricaud v. American Metal Co., 246 U.S. 304 (1918) arising out of a Mexican Revolution.

[2] Luther v. Sagor [1921] 3 K.B. 532; État Russe c. Ropit, Cour de Cass. (Req.) March 5, 1928, Journal du Droit International 1928, p. 674; Salimoff v. Standard Oil Co. of New York, 262 N.Y. 220, 186 N.E. 679 (1933) Ann. Digest 1933–34 No. 8.

tions[3] was very small.[4] After World War II, a new wave of confiscation cases arose out of the confiscatory measures in the communist-held successor states of the former Austro-Hungarian Monarchy. As, from before 1918, there still existed many business and family ties between inhabitants of these states and Austrians, Austrian courts now were flooded with confiscation cases.[5] Some of these cases present quite unique features.

Insofar as Hungarian and Czechoslovak joint stock companies were concerned, the respective nationalization laws[6] had not confiscated the companies as such, but the rights of the shareholders. These states pretended that, as their measures had not affected the legal personality of the company itself, no change of ownership had occurred in respect to the assets of such companies. Even if such assets were located abroad, these states hoped to be able to obtain them in spite of the stern attitude of foreign states, refusing any effect to foreign confiscatory decrees. They based their hope on the fact that formal title of these assets continued to rest with the company concerned,[7] although the state had acquired ownership of the company and of its assets *by confiscation*. The foreign courts, however, refused to follow this ingenious reasoning and did not recognize such camouflaged confiscations.[8]

[3] *Cf.* Edward D. Re, Foreign Confiscations in Anglo-American Law, (New York, 1951); Seidl-Hohenveldern, "Extra-territorial Effects of Confiscations and Expropriations," 49 Michigan Law Review (1951) 851–868; Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht (Tübingen, 1952) giving an exhaustive survey of all the problems involved.

[4] The Austrian cases were concerned with measures taken by the short-lived Bela Kun communist régime in Hungary after World War I. Austrian Supreme Court, August 27, 1919, Seidl-Hohenveldern, p. 10, and Oct. 31, 1922, Ann. Digest 1919–1922, No. 31.

[5] E.g., Hoffmann v. Dralle, Austrian Supreme Court May 10, 1950, 45 American Journal of International Law (1951), 354; Austrian Administrative Court, Jan. 25, 1950, Journal du Droit International 1951, p. 624; and the cases mentioned by Seidl-Hohenveldern, Internationales Konfiskations-und Enteignungsrecht, pp. 60, 74, 97, 114, and 127.

[6] Doman, "Postwar Nationalization of Foreign Property," 48 Columbia Law Review (1948) 1152.

[7] In favor of this pretense H. Lewald, "Zur One Man's Company als Mittel der Nationalisierung von Aktiengesellschaften im internationalen Privatrecht," Jur. Blätter 1952, pp. 238–240; contra Seidl-Hohenveldern, "Getarnte extraterritoriale Konfiskationsansprüche," Jur. Blätter 1952, pp. 410–413; the same, "Recognition of Nationalizations by other Countries," in F. M. Joseph's Report on Nationalizations to the International Bar Association Conference in Monte Carlo 1954, pp. 33–34; Wahle, Klang's Kommentar zum Allg. Bürgerlichen Gesetzbuch (2d edition Vienna 1952) vol. 5., p. 573; Niederer, Einführung in die allgemeinen Lehren des internationalen Privatrechts (Zürich, 1954), p. 180; and presumably also Schnitzer, Handbuch des Internationalen Privatrechts, vol II, 548 (Bâle 1950) and Rheinboldt "Die Stellung des Abwicklers einer Aktiengesellschaft i.L. kraft staatlichen Hoheitsaktes," Neue Juristische Wochenschrift 1954, p. 1830.

[8] Trib. Comm. Brussels, March 24, 1951, S.A. Textor c.S.A. Furexco, 53 Revue Pratique des Sociétés Civiles et Commerciales, No. 4361 (1954) p. 90 ff.; Austrian Supreme Court, Jan. 14, 1953, mentioned by Seidl-Hohenveldern, "Getarnte Konfiskation von Auslandsvermögen," Betriebsberater 1953 p. 840, note 45 (this case will be fully reported and commented in the next issue of the Jahrbuch für Internationales Recht, (Hamburg). Decisions by the Swiss Federal Court also refuse to grant effect to the confiscation of the rights of shareholders, in-

Thus, when the claims of the Hungarian Danuvia National Enterprise for the restitution of assets of the Danuvia Co., which were situated in Austria, came before the Austrian Supreme Court,[9] this doctrine had already been rejected by the lower Courts.[10] The Supreme Court merely confirmed their finding that the Hungarian measures concerned constituted a confiscation of the company. In order to do so the Supreme Court, however, had to refute two new contentions submitted by the appellant Hungarian National Enterprise. According to the appellant, "the transformation of the 'Danuvia' Manufacturing and Trading Joint Stock Company should not be considered as a confiscatory measure, in view of the fact that §14 of the Law XXV/1948 declares, that nationalization shall be followed by a payment of a compensation to be fixed by a special law." The Court rejected this argument, stating "there has been merely some vague promise of a compensation, of undetermined amount. The lower Courts did not consider it very likely that this promise will actually be fulfilled. Such a promise is unable to divest the nationalization of its confiscatory character. The lower Courts did not find that the "Hungarian State had already paid high amounts of compensation."[11] The Supreme Court, moreover, rightly rejected the "*tu quoque*" plea by the appellant, which maintained that the Austrian Nationalization Laws, No. 168/1946 and No. 81/1947 were likewise confiscatory. This plea would be invalid even if the compensation paid under the Austrian Federal Law No. 183/1354 is considered inadequate. Even if Austria would thus be held to have resorted to confiscations, this would not have imposed an obligation on Austria to tolerate the violation of its national sovereignty implied in the pretence of a foreign state to enforce its own confiscatory decrees inside Austrian territory.[12]

Having thus disposed of the claim of the National Enterprize, the Supreme Court now had to decide to whom the assets located in Austria really belonged. The Court followed the opinion of the lower courts, which had considered "the transformation of the aforementioned Joint Stock Company as a confiscatory

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sofar as they are intended to affect the right to dispose of assets of the company which are located in Switzerland. Swiss Federal Tribunal, May 3, 1927, in re Bachert & Co, BGE 53 II 54, Jan 23, 1953; Zivnostenska Banka v. Wismeyer, BGE 79 II 87, 92–93; and Feb 2, 1954, Ammon v. Royal Dutch Co., BGE 80 II 53, 62–63.

[9] Danuvia National Enterprise Budapest v. Seiberth, 3 Cg 359/49/58. Austrian Supreme Court Feb 3, 1954.

[10] Kreisgericht Wels, June 5, 1953, mentioned by Seidl-Hohenveldern, Betriebsberater 1953, p. 839, note 33.

[11] The Swiss District-Tribunal at Horgen, in a decision of Jan. 8, 1952, Schweizer Juristen-Zeitung 1953, p. 345, has pointed out, that the compensation promises contained in the nationalization laws of Eastern European countries do not correspond to a real intention of these states to pay compensation. A full indemnity seems wellnigh a financial impossibility in view of the extent of these nationalizations.

[12] Seidl-Hohenveldern, Internationales Konfiskations-und Enteignungsrecht, pp. 64–65 *Cf.* the attitude of French Courts, which did not consider themselves precluded from refusing recognition to Soviet confiscations by the fact that France itself had confiscated the property of religious orders (cf. *supra* note 1).

measure of the Hungarian State," which should not be recognized in Austria. The Courts had held that a '*communio incidens*' consisting of the former shareholders, should be entitled to dispose of the assets situated in Austria, belonging to the former joint stock company.

The lower courts have followed the now prevailing legal doctrine concerning the effect of foreign confiscatory measures in respect to assets situated in Austria. This doctrine is expounded by Wahle in Klang Kommentar 2, V. 571 f. The Supreme Court has decided to follow this doctrine, which is supported by numerous decisions and by numerous quotations from writers. "Plaintiff's appeal offers almost no arguments against this doctrine and in any case fails to disprove it."

The Supreme Court has thus applied the *communio incidens* principle contained by implication in its earlier decision of May 31, 1951 (1 this Journal (1952) 122) to enterprizes having a legal personality of their own. The author of this note approved the application of this principle in respect to partnerships without legal personality (the decision of May 31, 1951, concerned such a partnership) but voiced some misgivings, whether the same principle should also apply to foreign enterprizes with legal personality. He thought it preferable to have the local assets of such enterprizes wound up according to the rules of domestic law to be applied *mutatis mutandis*.[13] Wahle however, in Klang, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch (2nd edition) vol V p. 571, was of the opinion, that no such winding-up would be necessary. The Supreme Court now follows Wahle.

While, under this principle, the former shareholders may take the assets without having to go through winding-up procedures, the Supreme Court nonetheless intends to prevent them from taking the assets without the liabilities connected therewith. In this respect, the Court said "It is obvious, that the persons taking over the 'Danuvia' assets situated in Austria are liable to satisfy the creditors of the 'Danuvia' Joint Stock Company out of the assets they took over. The uncertainty of the situation may cause certain difficulties to the creditors. This fact however, is unable to alter the basic attitude of the Austrian State, in respect to foreign confiscations."

I. SEIDL-HOHENVELDERN*

[13] Valuable suggestions for practical steps concerning such liquidations are contained in Rheinboldt's article quoted *supra*, note 7.

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AUSTRIA: NONRECOGNITION OF RENO DIVORCES—Recently, the Austrian Administrative Court has had to decide the question of the validity of a Reno divorce under Austrian law.[1] Under the German marriage legislation, which has provisionally been maintained in force in Austria, foreign divorce judgments shall be effective in Austria only if the Federal Ministry of Justice has ascer-

[1] Decision of the Administrative Court, April 1, 1954, Renée H. née K., divorced S. v. Federal Ministry of Justice.

tained that the conditions required by law for the recognition of the judgment have been complied with; and such finding shall be binding on all courts and administrative authorities.[2] The case brought before the Federal Ministry of Justice presented the following circumstances:

On October 25, 1925, Renée H. married Leon S. in Vienna. After March 13, 1938, she sought in vain to divorce her husband before the Vienna court. The spouses, who in 1938 had already ceased to live together, subsequently emigrated, Renée S. to the United States, Leon S. to Shanghai.

On May 5, 1943, Renée H. (S.) obtained a judgment of divorce in Reno by default, her husband having failed to appear after summons by a notice in the Reno Evening Gazette and by a registered letter sent to a Vienna address.

After his return to Austria, Leon S. initiated divorce proceedings in Vienna. Renée H. (S.) objected to these proceedings on the ground that their marriage had already been dissolved in Reno. She therefore requested the Austrian Federal Ministry of Justice to state that her Reno divorce is effective in Austria. The Ministry rejected this request on the ground that the Reno divorce procedure did not give the husband a proper chance to safeguard his rights. The Ministry held it to be insufficient, that under Nevada law the court is required *ex officio* to protect the rights of the absent party. Renée H. (S.) now appealed to the Administrative Court to review this decision of the Ministry.

The Administrative Court decided that, in conformity with the rule cited above, "a foreign judgement shall not be recognized, if this would run counter to *bonos mores* or to the purpose of an Austrian law. The Federal Ministry of Justice rejected the request for recognition on the strength of the above-mentioned rule, basing its decision on the ground that the writ and the summons had not been served personally on Dr. Leon S. and that he was not even represented in the proceedings by a curator *ad litem*. The Administrative Court agreed with the Ministry, that this procedure is in conflict with the principles governing Austrian Civil Procedure. The Court quoted from §106, subp. 1, §109, §110, §111 subp. 2, §115 and §116 of the Austrian Code of Civil Procedure. The purpose of all these rules is to prevent proceedings being undertaken against a person, unless this person himself or at least a curator appointed for him be able to safeguard his rights in every respect. Proceedings which do not offer these safeguards must be held to run counter to Austrian public policy."

In order to uphold the legality of her Reno divorce, the appellant pleaded that at the time when this judgment was rendered the material conditions for granting her a divorce were fulfilled also under Austrian law. In effect, under §55 of the Marriage Law,[3] either spouse may ask for a divorce, if the spouses have not lived together for the last three years and if the relations between

[2] §24, Subp. 1, of the Fourth Enabling Ordinance to the Marriage Law of Oct. 25, 1941, German Reichsgesetzblatt I, p. 654; *cf.* Schwind, Kommentar zum österr. Eherecht (Vienna 1951), 287–298.

[3] Law of July 6, 1938, German Reichsgesetzblatt I, p. 807; Schwind, *op. cit.*, 199–203.

them are thus deeply and irretrievably disrupted. Such a divorce will be granted even to the spouse who caused such disruption, unless the other spouse raises objection. The latter's objection however, will not be sustained, if the maintenance of the marriage bond does not seem to be morally justifiable.[4]

It is true, that in the present case the relations between the spouses in 1943 had been disrupted for more than three years and that therefor the appellant would have had a very good chance to obtain a divorce, had she been able to bring her case before a Vienna court at the time when she went to Reno. However, in the eyes of the Administrative Court, her plea was "unable to cast doubt on the legality of the decision of the Federal Ministry of Justice. In deciding on Renée H. (S.)'s request to recognize the foreign judgment, the Ministry was not obliged to examine the judgment as to its correctness in respect to the material facts. Such an examination would amount to a reopening of the case by an Austrian administrative authority. The Ministry had only to ascertain whether the recognition would appear objectionable from the point of view of the Austrian legal order. As stated above, such objections did indeed exist; the complaint therefore had to be rejected as being without foundation."

Thus, the Administrative Court has refrained from extensively interpreting the power given by law to the Federal Ministry of Justice in respect to the recognition of foreign divorce decrees. As this power is difficult to reconcile with the ideal of the separation of powers, this attitude of the Court merits full approval.

I. SEIDL-HOHENVELDERN*

[4] While Austrian courts as a rule will consider such objections morally justifiable, even if based only on the wish to obtain thereby a higher alimony (Supreme Court April 12, 1947; Schwind, *op. cit.*, 202) German courts between 1938 and 1945 usually thought it preferable to enable the guilty spouse to found a new family.

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Documents

INTERNATIONAL COMMITTEE OF COMPARATIVE LAW INQUIRY ON THE ORGANIZATION AND PURPOSES OF INSTITUTES OF COMPARATIVE LAW

General Report, Presented by: Marc Ancel

Conseiller à la Cour de Cassation (Paris)

Note: The General Report which follows was presented in French by Judge Marc Ancel, Secretary General of the French Center of Comparative Law, former Secretary General of the Institute of Comparative Law at Paris, to the Colloquium on the Rôle and Organization of Comparative Law Institutes, held in Munich, July 23–27, 1954, under the auspices of the International Committee for Comparative Law. For an account of this Colloquium, see this Journal, Volume 3 (1954) 616. In the present translation, in order to conserve space, the text of the questionnaire on which the Report was based and the larger part of the footnotes have been omitted; on the other hand, the Resolutions adopted by the Colloquium have been included.

Pursuant to these Resolutions the Bureau of the International Committee on Comparative Law, during the sessions at Munich, July 28–30, 1954, made the following provision (as translated from the *procès-verbal*);

To give effect as rapidly as possible to the resolutions and *voeux* of the Colloquium, the Bureau decided to designate M. de Sola-Cañizares Director of the co-ordination of Institutes and Centers of Comparative Law and to establish a "Committee on Institutes" composed of: M. Yntema, chairman, MM. Ancel, Herzog, Graveson, Vallindas, Valladão, Elola, B. Tabbah, Dölle, Odaka, Matteucci, Malmström. . . . M. de Sola-Cañizares is to act in liaison with this Committee and is particularly directed, during the coming year, to give effect to the first resolution adopted by the Colloquium on Institutes of Comparative Law. (Establishment of a catalog of Institutes or Centers of Comparative Law).

H.E.Y.

The International Committee of Comparative Law decided, during the meeting in May, 1953, at Copenhagen, to organize during the 1954 session a colloquium relating to institutes of comparative law, and has invited me to present to this colloquium a general report on the subject. In preparation for this meeting, a questionnaire was drawn up and widely distributed.[1] The purpose of the present report is limited to communicating the results of the inquiry thus undertaken and to emphasize the points to which it seems that at the present time discussion might usefully be directed.

[1] It was sent to 69 different comparative law institutions; 46 responses have been received.

Nevertheless, before entering upon the substance of the present report, certain preliminary observations appear necessary, both as respects the preliminary inquiry and on matters to be treated in the present preparatory document.

The purpose of the inquiry undertaken has been to make it possible, in a precise and useful manner, to review the institutions of comparative law presently existing, namely, the institutions which, in some manner, practice comparative law by encouraging its study or which interest themselves therein in any form whatsoever. It should be well understood from the outset that the term institute of comparative law has been adopted solely on account of its convenience and since it is the most frequently employed. But it is clear that, to be really useful and complete, the inquiry should cover all institutions, however they may be denominated, which on one ground or another, constitute what we shall comprehensively call "Institutions of Comparative Law." What is involved is to determine successively the organization, then the activities of institutes of comparative law, and finally to endeavor to evaluate the results to which existing experience has arrived.

But, wide as this point of departure may be, it is desirable to avoid a confusion which would have ensued upon embracing in the present inquiry or including in the prospective colloquium questions relating to the teaching of comparative law or to comparative research in general. In a particularly suggestive response, Mr. von Mehren has made the very just observation that, in the United States, comparative instruction or investigations, which are conducted on the Continent of Europe in specialized institutes of comparative law, are in large part provided by the faculties of law. It could be added that in Europe itself, and frequently in universities where no institutes of comparative law as yet exist, comparative research may nevertheless be undertaken, in consequence of the individual action of a professor in a special field, seeking, for example, to stimulate doctoral theses on questions of comparative law. This constitutes a situation of fact which should not be neglected but which, most obviously, does not enter within the scope of the prospective colloquium. The object of the inquiry undertaken in preparation for the meeting at Munich is specifically to ascertain in what manner, when it has been thought necessary to provide for the creation of a special institution of comparative law, such institution has been conceived, how it has functioned, and what results it has achieved.

For the same reason, the inquiry undertaken, and the present report, logically exclude the situation where a particular branch of an institute, devoted to a purpose quite distinct from comparative law, is engaged, in some degree, in a comparative activity. If it had been desired to take account of this factor, which should no more be ignored than the preceding one, it would have been necessary to extend the inquiry to a multitude of institutions that widely surpass the domain of comparative law, whereas the purpose of the inquiry has been specifically to investigate how the institutes of comparative law in the proper sense of the term hitherto have been conceived or have functioned. In this connection, moreover, it should not be forgotten that, more and more, the different institutes or learned societies concerned with a particular branch of law tend to study the problems that relate thereto, taking account of the solutions or the trends in foreign laws. This necessarily results in comparative studies, but these institutions do not in consequence constitute "Institutes of Comparative Law," in the sense in which these have been understood in the present inquiry; they remain therefore logically outside of our study.

Finally, it should not be lost from sight that, as the inquiry undertaken relates solely to the institutes established in the different countries, namely, on a national basis, it has been necessary to leave aside organizations of international character or scope, which present entirely different

problems. Nevertheless, it is clear that here again the activity of these institutions is not negligible in the development of comparative studies nor, which is at least equally interesting, in the growth of comparative law documentation available for the use of specialists. But it has appeared evident that these institutions of an international character could not be placed on the same basis as those established in the different countries, and thus they have remained logically outside of the preliminary inquiry.

The scope of the inquiry which has been made being thus defined, it is necessary, before dealing with the results, to draw attention to certain of the difficulties which the author of the present report has encountered. Of these difficulties, we shall remark only the three following, which seem to us essential:

1. The inquiry has been conducted by the usual procedure of a questionnaire sent to the interested institutions. All who are acquainted with comparative researches know that this procedure, practical and even inevitable as it may be, nonetheless is almost inevitably deceptive. Whatever care may be devoted to the formulation of such a questionnaire, it is certain that the questions selected will not be equally adapted to the particular situation of each of the different correspondents to whom it is sent. Thus there remains a margin of uncertainty due to the fact that, in many cases, the correspondents hesitate to give information which they are not directly asked and which it was not possible to anticipate.

2. The value and the scope of the responses are of necessity quite different. Certain institutes, it must be recognized, have almost a merely nominal existence, sometimes even merely apparent; others exist only for a limited purpose, while externally they advertise much more complete activity. It is evident that, in the two cases, the institute concerned can scarcely be expected to give an entirely exact and impartial idea of its real activity. In other cases, even if one has not only visited but has for some time attended an institution of comparative law, it is difficult to evaluate exactly its importance, its precise activity, and even its scientific significance.

3. As has just been said, certain correspondents have had a tendency, understandable enough, to justify in some way their comparative law institution, to cover up defects, or to emphasize certain apparent activities. But inversely, certain others are at times inclined to criticize what exists, in order, it would seem, to promote a reform, and reflecting certain a priori conceptions concerning the general character of institutes of comparative law. These two tendencies, contradictory as they may be, nonetheless equally result in rendering difficult at times an exact assessment of the reality.

Account should be taken of all such factors and difficulties, if the precise value which this preparatory document may have is to be appreciated. Its purpose is only to furnish the participants in the colloquium at Munich documentation on the present status of comparative law institutions. In no wise does it purport to be a definitive doctrinal essay on the manner of constructing or conducting an institute of comparative law; and in this particular, the author of the present report has carefully sought not to intrude his personal preoccupations or preferences. It is hoped that this document thus will fulfill its true purpose, which is, reviewing the principal features of the present organization of institutes of comparative law, to reveal the concrete problems that present themselves in respect to these institutes and may usefully form the object of an exchange of views among specialists on an international basis.

Such being the case, the method which we have been led to follow in a way is imposed of itself. At the outset, it is appropriate, without presuming to reproduce all the details which may be found in the responses which have been received or in the statutes of the institutions of comparative law, to set forth in

its grand lines the present operation of these institutes such as they now exist. It is appropriate, in the second place, and on the basis of this descriptive study, to endeavor to define certain perspectives for the future, which perhaps might usefully form the object of the labors of the colloquium. But it will be desirable to define these two perspectives on a double level, which should be, successively, the national, regarding the essential points of the future, if not the ideal, organization of comparative law institutes, and the international, concerning the possibility of exchange or the modes of co-operation which may be conceived or adopted among the different comparative law institutions.

I

Present Functions of Institutes of Comparative Law

From the viewpoint of what exists at the present time, it seems that special attention must be given to defining the general features of institutes of Comparative Law as concerns, successively, the *creation* as such of these institutes, their *organization*, and finally above all their real *activity*. We shall here endeavor to do this, at the same time avoiding detailed enumerations, rash comparisons which might have the appearance of furnishing a sort of honorary list of existing institutions, and unduly general views, which would not be grounded in practical reality.

A. *Creation of Institutes of Comparative Law*

It will be observed at the outset that the date of creation of institutes of comparative law is in general recent. These institutions are in fact creations of the Twentieth Century. The Society of Comparative Legislation of Paris, founded in 1869, is apparently the ancestor of these institutions. This, the Society of Comparative Legislation of London, which dates from 1894, and the Belgian Institute of Comparative Law, founded in 1907, constituted the only three comparative law institutions existing before the war of 1914. Between the two wars, on the contrary, the creative trend was extremely active both in France and Germany, and in Italy, as well as in the United States or certain Latin-American countries. The trend, scarcely abating during the second world war, since 1945 has revived in Europe as well as in America and in the Near and Far East. From these few indications, it will be remarked only that, while the Congress of Comparative Law held in Paris in 1900 had a considerable immediate influence on doctrinal studies in the comparative field, it was only after the upheaval produced by the war of 1914 that the appearance and multiplication of comparative law institutes was really to be observed. Numerous causes prompted their creation, the chief of which have been, it would seem, the desire experienced in certain countries or in certain great centers to possess an institution capable of furnishing rapidly information respecting given points of foreign legislation, or placing at the disposal of specialists and more particularly of technical experts, to wit the legal practitioners, an exact documentation and, sometimes indeed, of filling under a new form gaps occasioned by the destruction caused by the two wars.

To the geographical distribution of the existing institutes, it does not seem that too great importance should be ascribed, above all since the numerous responses to the questionnaire do not appear to cover all countries nor all institutions. If one takes account solely of these responses, it will be noted that three European countries possess comparative law institutes exhibiting real activity: Germany (8), France (7), Italy (5). In America, 9 answers were furnished by the United States alone. The four countries just mentioned thus by themselves comprise twenty-nine answers out of forty-six. Argentina, Egypt, Great Britain, and Sweden, on

the other hand, each sent two responses. Finally, it is noted that there is an institute of comparative law in each of the following countries: Belgium, Brazil, Canada, Spain, Greece, Mexico, the Netherlands, the Saar, Sweden, and Turkey.

No more shall we insist upon the circumstances in which the different institutes of comparative law have been established. This question nevertheless would deserve the attention of anyone wishing to form a truly exact idea of the manner in which the development, in certain cases, of comparative studies has occurred. Nevertheless, it is evident that such circumstances are quite often contingent, that they are nearly always purely local, and finally that in many cases they are quite difficult to determine precisely. We would like only to present here on this subject two special observations.

1. The original source, but sometimes distant and occasionally not perceived, of comparative law institutes has quite a considerable influence on their scientific activity and on what one might term their almost corporate character. Some have had at the beginning a special and limited purpose; for example, the Swedish Institute of Stockholm was originally established to furnish information concerning foreign laws, especially with respect to fiscal and commercial matters, to enterprises engaged in international commerce. In other cases, and especially in the United States, institutes have appeared in the form of foundations, or in other words the establishment of a trust for a defined purpose: at times the donation has been made directly for the benefit of an institute the creation of which is automatically to follow; sometimes the grant may be made to an institution already in existence, for example, a university of which the institute forms a part or which is to create an institution for the purpose with lesser autonomy. Again in many cases, and we here can indicate, as will readily be understood, only in a very general fashion this situation, the establishment of the comparative law institute or the benefaction from which it is to benefit, will come from certain societies or certain enterprises which will have a direct interest in making it possible for such institute to function: it is clear that, in such case, the institute will necessarily have a certain orientation which should not be underestimated. Finally, it must not be lost from sight that the general phenomenon of imitation may have its place likewise in connection with the establishment of institutes: certain institutes of which the statutes are known and with which certain jurists have come into contact thus serve to prompt the establishment, in other countries, of certain comparative law institutions or to inspire their reform.

2. If the circumstances surrounding the establishment of institutes of comparative law are examined a little more closely, insofar as it is possible to understand them effectively, it seems that an evolution has taken place since the appearance of the first of these institutions. At the end of the Nineteenth Century, the institutions of comparative law, like the old French Society of Comparative Legislation, were essentially learned societies, or in other words, private institutions associating such persons as were interested either in foreign law or in the progress of their national law in an especially enlightened form. These institutions thus essentially formed academies. After the first world war, when the comparative law institutions commenced to multiply in the different countries, they then took more specifically the character of institutes attached, directly or indirectly, to universities. The basic reason for their creation then was to provide for certain gaps in the official instruction and to interest university professors and students in a discipline which the programs of university studies did not yet fully recognize. Following this path, there may be perceived, curiously enough but quite clearly, certain of the transformations that occurred, in a manner some-

times implicit or not officially recognized, in the conceptions which prevail in the different countries as respects the nature and function of comparative law itself. But this is a problem which reaches far beyond the creation or structure of comparative law institutions; nor is this the place to emphasize it.

B. *Organization of Institutes of Comparative Law*

The organization of institutes of comparative law may be envisaged from three different points of view. First, it may be asked what is the character and what is the precise autonomy of the institution studied. Attention may be given thereafter to its administrative organization as such, namely, its supervisory organs, its personnel, or its resources. Finally, one may consider more especially the statutory purpose which has been established and endeavor to determine for what ends such institution has been formed.

The first two questions, that of the public or private character of the institution and that of its autonomy are closely related: a purely private institution such as a learned society formed as an association, by definition enjoys complete autonomy, whereas an institute created within the walls of a university is, on the contrary, subject to more restrictive regulation, in addition generally involving supervision by certain superior official organs. Nevertheless, it will be seen that these two questions do not have perhaps quite the importance that one might attribute to them at first sight: it is important in such a matter to go beyond the appearances resulting from administrative regulations. Of 49 responses coming from autonomous comparative law institutions, 29 of such institutions are public, and 14 private. Their public character seems to be the rule in Europe, whereas in America, and especially in North America, their private character is on the contrary the rule.[2]

For the most part, in the European countries, institutes of comparative law are attached to a faculty or university; in the United States, on the contrary, institutes most frequently take the form of foundations, sometimes located within certain universities which themselves are otherwise of a private character. Of 8 American comparative law institutions that sent a response, only one, the Louisiana State Law Institute, could be considered as a public institution.

For the rest, it is pertinent to observe that the private character of these institutions, which, in continental Europe, tends to distinguish the comparative law institutes from the universities, tends on the contrary to bring them closer together in the United States, since the majority of the great American universities are themselves private. The character, private or not, of the institution furthermore will depend most frequently on an accident, namely, the circumstances in which it has been created, and there is no occasion consequently to pay too close attention to this, except to recall once more that the conditions of their creation always affect quite significantly the future destinies of comparative law institutions. If account is taken of these special circumstances of time and place, it will be observed that the public or private character and the freedom formally accorded to a comparative law institution are insufficient in themselves to determine the real nature, the precise importance, and the activity of such institutions.

The administrative organization peculiar to each institute should be more worthy of attention. The inquiry which has been undertaken nevertheless demonstrates at the same time that the pro-

[2] Europe: 6 public institutions out of 8 in Germany; 5 public institutions out of 6 in France; 4 public institutions out of 5 in Italy; 8 public institutions out of 10 in the other countries; 1 public institution out of 8 in North America; 2 public institutions out of 4 in South America; 2 public institutions in Egypt (Middle East).

visions relating to organs of supervision are practically the same in the different countries and, on the other hand, that in themselves they too are far from exercising a decisive influence on the real activities of these institutions. Everywhere there exists an executive committee or a committee of administration or patronage, on which there are almost automatically found grouped together a certain number of individuals connected whether with the universities, with public office, with the bar, or with different branches of the legal profession. It is without interest to compare here the place provided, as the case may be, to such or such special category, for it is quite evident that this place is determined as much by local circumstances or traditions as by the existence of some individual or another whom it is thought well to interest in the institute which is being created. Whatever may be done as to the rest, it is clear that an institution of this type is always more or less that of a man or of a staff: in France reference has been made long since to the "Institute of Lambert," as one could speak in Germany at a certain period of "Rabel's Institute."

Information relating to the personnel or to the differing resources which an institute has at its command would be more instructive. It is clear that even when an institute possesses an executive council on which distinguished personalities are included, its actions can be exercised efficiently only through the intermediation of the executive director or the secretary general, whose mission it is to make it function. But it is also clear that such director or secretary general will not of themselves be able to have more than a relatively limited sphere of action, if they do not limit themselves for example, which is already much indeed, to the publication of a regular review. To enable it to function, a comparative law institution should have a personnel, the more numerous as it endeavors to develop its activity with regard to an increasing number of legislative systems, making necessary knowledge of a more or less extended number of different languages. In this respect, it may be regretted that indications were not more frequently given in the responses which were received. For example, the case of the Max-Planck-Institute at Tübingen may be cited, with a personnel including 12 scientific collaborators, 4 assistants, and 5 employees. If, as is desirable, a precise and complete list of comparative law institutions is to be made with a view to a documentary publication, it is evident that information of this nature should in the first instance be included.

It would not be proper to deduce from the present inquiry an average number of collaborators, which in view of the diversity of the institutions and the variety of their resources, would be without real significance. We note here only that the difference existing between the institutes is great, and that it has been possible to obtain on this point very little precise information. Nevertheless, it will be observed that a third of the institutions consulted employ a maximum of three persons on a full-time basis.

It is difficult and sometimes more delicate to obtain reports on the financial or material resources of comparative law institutions. Such resources, moreover, may vary from one year to another. On the other hand, they are not readily comparable among each other, for here the local circumstances to which we have already alluded play a part, and in a peculiarly significant manner. Only fifteen of the institutes which responded have indicated the amount of their resources. Reference is made to these only by way of example, limiting ourselves to remark nevertheless that certain institutes appear to have, properly speaking, neither special personnel nor resources. It is evident that in such a case the institute of comparative law consists primarily in a public notice and that it manifests itself only in certain meetings or in certain publications, which risk having a quite occasional character. The creation of such an in-

stitute, however, is not a matter of indifference, for it allows the place accorded to comparative law in the country concerned to be measured, and often it is the prelude to a more complete and more satisfactory organization.

The utilization of the resources of the institutes, if it were known, would also permit interesting comparisons. It would be useful to know, to what extent, for example, the resources are employed so as to give priority to more extensive documentation, the remuneration of researchers, the promotion of publications, or compensation for some instruction. It would be equally useful to know, which is perhaps still more difficult, to what extent the existing institutions can count, outside of their regular collaborators specially remunerated for the purpose, on certain entirely or partially gratuitous services, offered by jurists who, although not members of their official personnel, nevertheless form part of what might be termed their scientific personnel or their working organization, understood *lato sensu*.

A last question relating to the resources of the institutes concerns both their physical plant and the documentation which they possess. Particularly in Europe, certain institutes have had to locate themselves in fortuitous quarters, and sometimes they have no other place than a workroom placed at their disposal, sometimes even temporarily, by the faculty of law. In other cases, on the contrary, the definitive establishment of the institute of comparative law is accompanied by the construction or the allocation of a special building in which it can be installed and given facilities for the exercise of its activity. Here again, knowledge of certain material facts concerning the space at the disposal of such an institute, is of a nature to provide information on its real possibilities of accomplishment.

The library, or more exactly the center of documentation, at the disposal of the comparative law institute is no less worthy of attention. One may even see that in certain respects this center of documentation constitutes the true criterion of the activity of an institute of comparative law. It may therefore be regretted, here again, that more precise information on the extent of the documentation available to each institute, has not been provided in the responses which have been received. It is observed simply that institutions like the Institute of Tübingen, the Institute of Advanced Legal Studies, or the Committee of Foreign Legislation of Paris are particularly noteworthy for the important collections which they possess.

The organization of comparative law institutes, whatever be their nature and whatever be their resources, is dominated, as we have had occasion to insist previously at various times, by the purpose which they pursue, or in other words, by the activity in which they conceive themselves engaged. It is desirable, however, to remark particularly that the activity of comparative law institutions may be envisaged at two levels: first that of their statutory activity, namely, that which officially pertains to them; then at the level of their real activity, namely, that in which they engage in practice. The statutory activity is an important element of the official organization of comparative law institutes. The real activity, evidently much more delicate to ascertain, forms a sort of proof of the statutory provision and the difference between these two activities often makes it possible to take account of the exact possibilities of development of comparative law institutions as well as of the difficulties which they encounter.

It will be appropriate to explain as completely as possible, at least as indicated by the reports which have been received, the real activity of the comparative law institutions. It is necessary for us to recall here, as is self-evident but is sometimes lost from sight by some, that it is not sufficient to consult the statutes of an institution to ascertain exactly its purposes and its functioning; this rule of experience is perhaps truer

than ever for the comparative law institutions.

Solely with respect to statutory organization, we shall limit ourselves here to the three following observations:

1. It is remarkable that a certain number of institutes (13 out of 46 which have answered) at the same time have undertaken the study of comparative law and of international law. Evidently this is not the place to raise the old question, perenially discussed, of the precise relations between international law and comparative law. Nevertheless, we note that a certain number of institutions resolutely seek to combine the two disciplines; here again, it would be interesting in studying the actual life of each of these, to inquire whether one of these disciplines has not in the last analysis in some degree prejudiced the development of the other.

2. The majority of the comparative law institutions voluntarily assume the very broad task of promoting or of developing studies in comparative law in all their forms. The advantage of such a provision evidently is to facilitate thereafter all real possibilities of action; but in the presence of such a statutory provision it is important to investigate how the institution in question has undertaken to define its role. Certain institutions, on the contrary, have been assigned specific tasks. The Comité de recherches législatives et de droit comparé of Cairo, created at the end of the year 1952, has the specific purpose of elaborating a draft civil code with the Mohammedan law as its principal source, attended, in case of need, by comparative studies conformably to the comparative law method of the Congress of 1900. The Harvard Law School and the Ministry of Justice of Israel two years ago formed "The Harvard Law School Israel Cooperative Research for Israel's Legal Development." The Institute of Comparative Legislation of Stockholm, created through the co-operation of certain large private enterprises, has the mission of furnishing these enterprises with information concerning foreign laws, particularly in fiscal matters. The Institut für Rechtsvergleichung of the University of Munich has undertaken, as its essential purpose, to furnish consultations to administrative authorities, and it states in its response that in the neighborhood of 2000 have been furnished since the year 1949. These are but some examples, which might be multiplied.

3. The comparative law institutions finally may be statutorily specialized in the study of certain legal systems. Thus, the Institut des Hautes Etudes arabologiques, created in 1953 in Cairo is to study especially the principles of comparative Mohammedan law. There may be found, on a plan still more directly scientific, a similar specialization on geographic lines in certain institutes of Latin America and in the Institute of Advanced Legal Studies, which has as its primary task the study of the laws of the British Commonwealth. Such specialization may even appear in the official denomination given the comparative law institution. Even more frequently, specialization will result gradually from the conditions under which the institute operates and from the facilities which varying circumstances, sometimes resulting from its location in space, may in fact provide. But here one already touches on the *real* activity of comparative law institutions.

C. *Activities of Institutes of Comparative Law*

When an endeavor is made to determine the activities actually conducted by comparative law institutes, it is observed that all, on diverse grounds and under different forms, organize meetings which range from certain isolated conferences to colloquia or congresses. This constitutes a kind of practical necessity that one may regard as assumed and on which there is no occasion to insist further, save to observe on the one hand that in certain cases the organization of courses and conferences may enter into certain of the activities which we now proceed to consider in more detail, and to observe, on the other hand, that even when

such meetings are organized only occasionally and without predetermined program, they contribute, to a variable degree but which can always be useful, to developing knowledge of foreign laws and interest in comparative studies or researches. Outside of these meetings, the comparative law institutes at the present time in fact have five different functions, which moreover may be cumulated with each other and which it is necessary to review in succession.

a) *Instruction.* Many comparative law institutions have been established in the framework of a university and with the object of providing instruction supplementary to that which is given in the existing faculties of law. Therein comparative law institutes resemble other institutes which are established in many countries of continental Europe or in particular of Latin America, on the periphery of various universities.

It will be noted that one of the varieties of instruction given in the comparative law institutes may consist of lectures or better still practical exercises in legal terminology providing access to the documentation of certain foreign legal systems. This is what exists notably at the Institute of Comparative Law of the University of Paris, at the Institute of Legislative Studies of Rome, and at the Institute of Comparative Law of Barcelona.

As regards the instruction and without entering here upon the details, which would surpass the scope of this general report, it may be remarked that two tendencies appear among the different institutes of comparative law. The first, which is often the more ancient, consists in organizing instruction in foreign law; but this instruction may itself be given in a double form. In an analytical form, which often is perhaps the most immediately useful, it will serve as an introduction to the various foreign law systems. It will then have as its essential purpose to extend the knowledge of the fundamental institutions of the great systems and, for an institute established in a "continental" country, it should include, so it would seem, in the first instance study of the common law system, the inverse being true for an institute in the Anglo-American countries. The problem which may then arise is to know how the instructional staff charged thus to initiate national lawyers in foreign systems shall be recruited. On this point, one appears still to be at the stage of experiment and empiricism, although certain institutes, notably in Latin America, have apparently made a serious effort to secure the participation of professors visiting them to teach their own law.

Instruction in foreign law may also be given in a synthetic form, and such has long been the formula of the courses of comparative law. A problem then is taken and treated in different systems, with reference, for example, to the formation of contracts, the law of the family, or of the parliamentary regime. This formula is still widely employed in the different comparative law institutes, but it perhaps tends to lose its importance slightly in proportion as the institutes themselves specialize in the study of certain systems, and to the extent also that the regular instruction of the faculty of law tends likewise to include a comparative portion: these then render unnecessary such synthetic resumé of comparative law, which the institutes had formerly the object of furnishing to students outside of the normal framework of the faculty.

A second current, perhaps more perceptible in the last period, tends to inaugurate in the comparative law institutes instruction designed to acquaint foreign students with the national law of the country. This point of view seems to have been particularly developed in the United States, notably by the Institute of Comparative Law of New York University and by the Inter-American Law Institute. From this point of view, it is possible in certain respects although perhaps with some slight exaggeration, to regard the Salzburg Seminar designed to introduce young European lawyers to American law and to the case method, as itself forming a comparative law in-

stitution. We note only that this form of comparative instruction appears to be developing in the most recent period. For the rest, it may be combined with instruction in foreign law designed for the citizens of the country in which the institute is located: this is what has existed since last year at the Institute of Comparative Law of the University of Paris.

b) *Research.* After instruction, it is probable that scientific research has been historically the essential *raison d'être* of comparative law institutes. In practice, it continues to appear in nearly all the statutes of the existing institutions, and in any event it may be said that it is formally excluded at the present time by almost none of these institutes.

From what has already been said, it may be inferred that the research organized by the comparative law institutes may appear in two forms: the first is that of pure scientific research conducted, at least at the outset, without any practical objective. This is the point of view that to the present time has been prevalent in the French and Italian comparative law institutes and which finds a large place in the German institutes or in the Institute of Advanced Legal Studies of London. The other form of research is what may be termed applied research. We have already given some examples in reviewing the special purposes assigned to certain comparative law institutions by their statutes. Moreover, in the majority of cases, as especially concerns the Italian, English, and German institutions to which we have just alluded, pure and applied research may be conducted together.

We shall only note, to conclude on this point, the recent evolution which appears to assign an increasingly greater place to applied research, or at least to research undertaken with certain practical ends in view. In this connection, it will be observed that the first comparative law institutions, such as the French Society of Comparative Legislation, adopted a utilitarian purpose in conducting the study of foreign laws with a view to the "reform of the national law." It seems that, following the Congress of Comparative Law in 1900, research for a certain period was conceived in a manner more rigorously scientific and more consciously disinterested, perhaps still with certain reservations looking to the discovery of a uniform natural law calculated to allow ultimate unification of the legal systems. At the present time, interest is directed rather to the analytical study of foreign systems than to broad comparative syntheses. The primary object therefore consists in making known foreign legislations in order to instruct those who, for any reason, need to be informed in a precise manner. By this very fact, research tends to become, if not of a practical nature, at least practically useful, and it approaches another function of the comparative law institutes, the importance of which today can but increase, namely documentation.

c) *Documentation.* The assemblage of a complete legislative documentation alone makes possible researches in comparative law, as it equally gives effective assurance of such instruction as a comparative law institute may provide. Every comparative law institution thus tends, by a kind of natural necessity, to become a center of documentation. It always possesses a foreign library, unless there is a library created as an autonomous institute. Often a reading room is the origin of the creation of an institute, and the first of all the comparative law institutions created in the world, the Bureau of Foreign Legislation instituted by Bonaparte in the year IX, had specifically for its object the collection of a legislative documentation necessary for the drafters of the future code Napoleon. Hence there is no need to insist upon the documentary function of comparative law institutes, except to remark especially that this aspect of their activity has developed only in the course of time. To the extent that comparative law studies have been increasingly understood in the double sense of an introduction to foreign legal systems and a comparative study of each branch of the law by the specialists

themselves in such branches, the tendency has been to organize comparative law institutes in a manner such that these institutes may furnish those who propose to undertake these two types of studies with the necessary elements for conducting them well.

Nevertheless, it appears more and more that the mere assembly of a library is not sufficient to provide the necessary documentation for a really modern institute and this from the following triple point of view:

1. A collection of works, necessary as it may be, will always be fatally insufficient, as a result of which, in a well-organized institute, there is the necessity of completing the library properly so-called by other sources of documentation, such as articles in reviews, translations or the collection of texts of laws, and informations from other centers where the desired documentation can be found;

2. Thus understood, a documentation cannot be really usable, except to the extent that a specialized staff keeps it up to date and makes its utilization possible for those who need it: hence the repercussion of the organization of documentation on the general organization of the comparative law institute and the correlative enlargement of its personnel;

3. Utilization of documentation for pure or applied research inevitably leads the different institutes to establish scientific relations among themselves. This involves in effect that they consult among each other, and the sending of questionnaires, which concern documentation as much as research, however imperfect or even abusive it may be in certain cases, nevertheless has as a happy consequence the establishment of exchanges of documentation among the institutes. Certain other institutes, on the other hand, have been led to establish for themselves some specialization so as to possess sufficient documentation for the immediate object of their field of activity, whereas it would have been impossible for them to secure general documentation for all systems or all branches of law. Specialization and liaison among the institutions moreover lead us to envisage a fourth activity of comparative law institutions.

d) *Scientific Relations.* Comparative law institutes have acquired the custom of establishing scientific relations among themselves, the more natural as the very object of their studies induced them to look abroad. The relations thus established moreover may be envisaged on a double level, the international level and the national level.

On the international level, the various comparative law institutions have for a long time had foreign correspondents. To the extent that these institutions form learned societies, the designation of these correspondents even constitutes one of their first activities or preoccupations. Also, one may go beyond the somewhat passive stage of such relations among correspondents, in an effort to bring about exchanges of personnel, which long since have included exchanges of professors and which should include more frequently still an exchange of students or of researchers. Here we can only remark this problem which has been very little considered in the answers which have been received and which, by all the evidence until the present time, has had only for the most part empirical solutions, visibly dependent upon circumstances of time and place. The United States nevertheless seems to offer an exception deserving of notice to this general rule: the establishment of exchanges among institutes, notably by the institution of a system of fellowships, well organized, has there been systematically followed.[3]

On the national level, exchanges

[3] The granting of fellowships, either to Americans in order to go to study foreign law systems, or to foreigners in order to come to the United States to study the Anglo-Saxon legal system, is one of the activities specified in the statutes and carried out in reality, by independent comparative law institutions as well as by the "Comparative or International Law Programs" of the Law Schools.

among institutes are no less frequent and desirable, above all to the extent that the institutes of a single country can be specialized and can appear to complement each other. In this respect, co-ordination of the activities of the national institutes may itself be entrusted to a distinct institution, as has been contemplated in France, for example through the services of the French Center of Comparative Law. It seems that, on this question, the existence of the national committees of comparative law can serve, to the extent that they have not already accomplished this, to provide a closer liaison among the different institutions of a single country.

e) *Publications*. The last of the activities to which comparative law institutes devote themselves and which should especially be remarked consists in publications. The research conducted within the comparative law institutes normally results in certain publications. The instruction itself can stimulate this, not only to the extent that it forms an "instruction in research," that is to say, a pedagogical exposition of the results obtained by different researchers, but also to the extent that it stimulates researches leading ultimately to publications. The importance that the preparation of certain theses on law may have in the activities of comparative law institutes in France is well known: the Institutes of Lyon and of Paris at the beginning were essentially workshops where comparative law theses were prepared, and the Institute of Comparative Caw of Toulouse has assumed this preparation of theses as an essential task. Finally, the documentation itself may form the object of various publications, for it is only by these publications that such documentation can be placed in the hands of all the researchers or all the jurists interested in questions of foreign law.

Hence, it is understandable that nearly all comparative law institutes have undertaken to prepare certain publications. Certain comparative law institutions have even been created only to provide for a new publication, like the Institute of Comparative Law of Brussels, the Society of Comparative Legislation of London, or the American Association for the Comparative Study of Law, created in New York in 1951, the principal purpose of which has been to provide for the publication on a nonprofit basis of a review of comparative law.

Aside from the reviews, other publications may be supported by the comparative law institutes. Certain of these form collections of theoretical or practical studies relating to certain legal problems. Documentation also has formed the object of apparently increasing consideration on the part of the institutes. From its origin, the Society of Comparative Legislation of Paris decided to undertake the publication of a yearbook of foreign legislation, today published under the auspices of the French Center of Comparative Law. The attention given by the Institute of Legislative Studies of Rome to the publication of its yearbook is equally well-known, and one recollects the important documentary part which relates notably to the law of the British Commonwealth in the former Journal of Comparative Legislation. The American Journal of Comparative Law, published by the institution created in 1951 at New York, as we have just recalled, on its part gives particular attention to international legal documentation. Thus, the various activities of comparative law institutes end in a way in publications, the additional advantage of which is to make known the institutes of comparative law which undertake them, and to allow the establishment among them of useful and regular contacts.

II

Perspectives for the Future and Proposals of Reform

It would not be sufficient for the International Committee of Comparative Law to expose, as it were passively, the dominant features of the comparative

law institutes at present in operation, without seeking to deduce from this study some lessons or to formulate some suggestions looking to improved organization and operation of comparative law institutions.

It is proper here to resist the temptation that anyone may have to develop the plans of the ideal comparative law institute somewhat after the manner of Thomas More describing the island of Utopia. All those who have practiced comparative law necessarily have in this subject matter their own conceptions, their preferences, perhaps even their prejudices, and, in any event, their projects, the absolute realization of which they would demand if only this were possible. The contemplated colloquium should have as its purpose specifically to contrast individual points of view and to permit a wide exchange of ideas on this subject. But evidently it is not the role of the general reporter to make known or to seek to have his particular point of view prevail. In this connection, we also take the liberty of referring to the very complete and highly suggestive reflections of M. René David on the organization and the role of comparative law institutes. The limited observations which follow have no other object than to seek to define a certain number of factors which seem to us to result directly from the descriptive inquiry undertaken by the Committee.

To do so usefully, it is appropriate to envisage the problem from the double point of view from which it can be logically treated, namely, from the internal point of view in the first instance and then from the international point of view.

A. *The Internal Point of View*

At the internal level, namely, at the national level as such, the question, it seems to us, should be envisaged from two aspects which may be termed successively negative and positive.

In effect, the problem arises, in the first instance, from an aspect which we shall readily characterize as negative. The creation, the organization, or the operation of institutes of comparative law in effect encounter a certain number of difficulties, of impedimenta, or even of impossibilities, which it is of importance not to misunderstand from the outset if really useful work is sought to be accomplished. These negative factors seem to us to lend themselves to summation under the three following heads:

1. In the first place and in an imperative manner, there exist necessities and local situations the importance of which we have had to emphasize in various connections and which certain founders of comparative law institutes have sometimes failed fully to perceive. There are reasons which, at a certain moment and in a certain country, demand or favor the creation of a comparative law institute. In the same circumstances of time and space, there are conditions which make it possible to obtain the assistance, both scientific and material, which is necessary for the organization and operation of a comparative law institute. On the other hand, in the different countries and in the different centers, there are existing situations, perhaps even vested positions, which it would be vain to neglect and from which it is illusory to suppose that it is possible to free oneself easily. In this are to be found a whole series of imperative considerations of which the creator or the promoter of a comparative law institute more than anyone else should be cognisant; he must remember that in this science, still young and still constantly discussed, politics is nothing else than the art of the possible.

2. Precisely because comparative law is still quite widely misunderstood even by those who need it and sometimes by those who advocate it, it is important not to seek to impose in some way a comparative law institution from outside and so as to do violence to an environment which is not disposed to accept it. A patient labor of approach and one may almost say of propaganda, in the better sense of the word, is indispensable to overcome the quasi-instinctive apprehensions and resistances which comparative science still arouses. It is important

above all at the present time, it seems to us, and as indicated by the experience of the existing institutes, to avoid making of the comparative law institutes varieties of academies and centers of doctrinal speculation. The science of comparative law without doubt profited much from the remarkable movement of ideas initiated by the Congress of 1900; but the methodological quarrels in which the comparatists became somewhat involved at the commencement of this century aroused certain resistances. It is proper, therefore, if it is sought to accomplish useful work, to abstain from certain quarrels, interesting but quite devoid of practical interest, and above all to search to train what Edouard Lambert at one time called the "laborers of comparative law."

3. It is desirable, finally and above all, to take account of what M. René David, following Gutteridge, very justly terms the necessary limitations on any serious study of comparative law. It is impossible today for a single man or even a single institution to embrace in a single comparative study all systems and all branches of law. The time of simple curiosity and above all that of a certain amused amateurism is today superseded. Every comparative law institution which proposes to do useful work thus in practice will be led to limit its field of action, whether to certain legal systems or to certain legal disciplines. This restriction frequently will be imposed by circumstances and the possibilities of action. It is well to take account of this at the outset in order to avoid the waste of certain useless efforts and, through specialization which may be at the least more or less broad according to the circumstances, to assure from the outset the effectiveness of the project undertaken by the new comparative law institution.

Such are the negative elements which should be present in the mind of every founder or of every director of a comparative law institution. He must not less take into account certain factors, this time of a positive nature in turn, relating successively to the autonomy of the institution contemplated, its organization, or its personnel, and finally above all its activity.

The autonomy envisaged may be autonomy of a financial, material, or administrative character. It may also be a scientific autonomy. There is little to say on the first of these, which, after all that which has been observed in the preceding exposition, essentially depends on national or local circumstances; it is necessary only for the founder or the director of the institute of comparative law to have these in mind and to secure the best provision possible. Scientific autonomy means that which would limit the action of the institution to the domain of comparative law alone. It has been possible to observe that in practice such autonomy does not always exist in consequence of the very conditions under which comparative law institutions have been created. It is nevertheless desirable that it should be sought; and this is in fact most frequently the case, since experience demonstrates that, when a comparative law institution is established in the interior of a greater institution, it seeks quite naturally to ensure its liberty of scientific action. The most delicate point of the problem and the most general from the point of view of method is probably that of ascertaining whether it is desirable, as has often been done, to unite studies of comparative law with studies of international law. Without inquiring as to the doctrinal or methodological reasons themselves which may lead to such rapprochement, it will be observed that often the jurists who practice comparative law are equally, if not even initially, those who are interested in international law; and there exist in the two disciplines evident points in common; they equally exhibit factors looking abroad and that universalist vocation, which create fundamental affinities between the two sciences and distinguish them naturally from other legal disciplines. Nevertheless, it is not certain that the coexistence of international law and of comparative law which, in spite of everything, is not imposed by pure logic, may not present some dangers

for comparative law. It even seems that the development of these mixed institutions often tends definitively to the benefit of international law and at the expense of comparative law.

As concerns problems of organization and of personnel, here again local circumstances are decisive: both for the designation of directive organs and for the choice of collaborators, it is evident that account must be taken above all of what lies at hand. But it may be noted that, practically speaking, nearly all the comparative law institutions seek to make as wide an appeal as possible simultaneously to all special branches and to all legal professions. This is a tendency that one will be the more inclined to encourage as it is considered that the problem is less to train "comparatists" as such than it is to interest jurists concerned with different branches of law in comparative research.

At the present time, recruitment of the personnel of comparative law institutions is still remarkably restricted. Except perhaps during the very recent period, it may be said that it has been almost by accident that certain jurists have devoted themselves to comparative studies. Also, the choice available to those directing comparative law institutions is still very limited. Experience demonstrates, however, that, to render real services, the personnel should have not only a minimum indispensable training, notably as respects knowledge of foreign languages and legal terminology, but also equally as regards specialization. In this connection, the recruitment of certain collaborators may sometimes be dictated by their knowledge of certain rare legal terminology and may occur to the detriment of specialization as respects matters, which should nevertheless not be lost from view. Experience also teaches that whatever may be the undeniable interest which a corps of qualified researchers presents in a comparative law institution, the presence and well-conceived utilization of a group of technical assistants, not seeking themselves directly to undertake comparative doctrinal studies, is one of the indispensable factors for the activity of a comparative law institution. Finally, a tendency which should be encouraged is manifested in the utilization by the institutes of a given country of lecturers, researchers, or collaborators coming from another country, trained in the technique of another system and permitting these institutes to acquire documentation or to undertake studies relating to the system of the country to which these visitors pertain.

The essential positive element which those who propose to establish or develop an institute of comparative law should take into consideration, evidently is to know what activity they contemplate is to be reserved for it. It has been seen that, until the present time, the general tendency of comparative law institutions has been to seek to develop their activity simultaneously in instruction, research, documentation, and publications. The question to be ascertained whether such or such institute can usefully at the time enter upon various of these directions evidently is here again determined by local conditions which it would be vain to seek to systematize in the abstract. We believe it useful, however, to insist, so far as concerns the suggestions to be drawn from our inquiry in this connection, upon the three following points:

1. At the present time, instruction is one of the essential tasks of comparative law institutes, and even those, as that as Paris, which at a certain time have renounced it, almost necessarily finish by coming back to it. The reason for this is that only the organization of instruction in the comparative law institutes permits the dissemination of comparative studies and above all the training of an adequate personnel which the different comparative law institutions can employ thereafter. It thus seems that, on a basis and for purposes chiefly practical and without seeking in any wise to establish formal instruction, this should as much as possible be recommended and developed.

2. Documentation has become in practice the chief preoccupation of com-

parative law institutions having a real activity. The fact is that the establishment and development of such documentation, for a comparative law institute, is the source of all other activities. On this point, one may refer unhesitatingly to the special observations of M. René David, in the note which he has devoted to the formation and role of comparative law institutes. From the viewpoint of the practical suggestions to be drawn from the inquiry undertaken by the International Committee of Comparative Law, it will be stated only that documentation in the future should not consist simply in the creation and maintenance of a library, however liberally contemplated it may be; that, on the contrary, such documentation should be extended to include, and this should be one of the essential preoccupations of comparative law institutes, systematic research in the sources in all their forms, so as to provide useful information for those who need to undertake a comparative research; that, finally, the organization of the documentation supposes coordination of the information obtained and the possibility of requesting information from other centers of documentation with which the institute may have connections.

3. One of the essential tasks of a comparative law institute should thus be at the same time the establishment of serious and permanent scientific relations with the different centers of study within the same country or abroad. It is eminently desirable that, if there are numerous comparative law institutes in a given country, one special institution, which can in case of necessity be one of these institutes, should be entrusted with the task of co-ordinating the action of all the others, and to organize the development of their exchanges so as to insure the co-ordination of their action.

B. *The International Point of View*

The co-operation of which we have just spoken among the institutions of comparative law is generally quite easy to establish at the internal level. Comparative law institutions in a single country are in effect normally quite few and relatively quite specialized. They complement each other much more readily as they do not compete and nearly always there exist among them relations which quite readily permit exchanges, although up to the present time these relations may be far from duplication of effort. This does not result of itself from the international viewpoint where comparative law institutions still are relatively little acquainted with each other. The mutual acquaintance of jurists who devote themselves to comparative law, and which is eminently fruitful, does not serve to take the place of knowledge which the institutions should have not only of their existence but of their possibilities of actions. Undoubtedly, for a long time since, official relations have been established among comparative law institutions pertaining to different countries. It would be possible to cite frequent examples of effective co-operation, and the sending of questionnaires of one institution to another is one of the most usual and most tangible forms of this operation. Nevertheless, it is incontestable that there still remains much to be done in this domain, where, as a result of diverse circumstances, and notably the fluctuations to which international relations have been subject since the beginning of the century, many comparative law institutions still are to be found much too enclosed within themselves, moreover without having always the possibility of knowing and understanding the foreign institutions with which they could usefully communicate.

Here it is, it seems to us, that the International Committee of Comparative Law can have a really effective function and can assume a magnificent task to accomplish. In this respect, it seems to us that three objectives could systematically be pursued by the Committee following the inquiry on the organization and the operation of comparative law institutions. These three successive, and also hierarchized, objectives would be the mutual understanding

of comparative law institutes among themselves, the co-operation and co-ordination of these institutes, and finally what must be termed the international rationalization of their action.

1. Knowledge of comparative law institutes should be developed in a double form. It is desirable, in the first instance, that each of these institutions should be known in itself and such as it is. It is therefore desirable that as rapidly as possible there should be undertaken, on the initiative or at least under the auspices of the International Committee of Comparative Law, an exact, precise, and up-to-date catalogue of the comparative law institutions, allowing one to ascertain their exact title, the place and name of their responsible directors, their general activity, and the purposes which they have undertaken to fulfill. Much information of this nature already appears in the answers made to the inquiry of the International Committee of Comparative Law; yet it would be rash to consider that these answers are sufficient to allow, as of the present time and without further information, this indispensable list of comparative law institutions, functioning at the present time in the different countries, to be made.

Understanding of comparative law institutes moreover should be developed on a reciprocal basis and through the systematic establishment of regular international relations; these should include at the same time exchanges of documentation, exchanges of persons, and likewise, what to the present time does not seem to have occurred except in an entirely occasional manner, exchanges of programs.

2. We are thus led to envisage another international activity of the Committee which would contemplate the co-operation and the co-ordination of the comparative law institutes of the different countries. To the extent that these institutes are known to each other and can ascertain why and how they may communicate to one or another among them, there will be established among these institutions a spontaneous mutual assistance, which will be such as to favor most efficiently and most broadly to facilitate comparative studies.

Nonetheless, it will be necessary to go further and to contemplate concerted co-ordination of efforts. It is not to be doubted that duplication of efforts, which are readily avoidable at the national level, still flagrantly exist today at the international. Topics like the delinquent minor, for example, have concurrently formed the object of investigations undertaken by different institutions, which resulted in reciprocal overlapping of questionnaires, whose multiplicity moreover has not always contributed to clarify the problem studied. It would be highly desirable that the Committee should be able, by practical procedures, which it is important to study, to permit the different comparative law institutions not only to know their respective programs but also to consult with each other in a way which will avoid having the same tasks undertaken at the same moment by different institutions, or allowing on the other hand a single task to be divided, but now in a rational manner, among different institutes pertaining to different countries, in accordance with the geographic or scientific facilities which are at the disposal of each of such comparative law institutions.

3. Such an enterprise could not be successfully controlled except by what may well be termed *international rationalization* of the activities of comparative law institutes. Assuredly, there is no purpose to establish, on any ground, a sort of international *dirigisme* of studies, which would result in promulgating interdictions or issuing injunctions to such or such institutes relating to such or such particular task. For the rest, it will be recognized that this danger is scarcely to be feared, since at the present time there exists no international institution which has the power to impose or, on the contrary, to prohibit any particular undertaking, as respects a national institute of comparative law. But inversely it will be admitted quite readily that a

rationalization freely agreed to and followed under a plan of loyal collaboration is eminently desirable at the present time.

The International Committee of Comparative Law, it seems to us, has an important task to perform in all these respects. It can participate in a large measure in correlating programs established by the different comparative law institutes with a view to their prosecution under the best and most effective conditions. Doubtless, it will be objected that this policy of rationalization could not produce all its effects, except to the extent that ultimately a certain specialization of the tasks that they undertake might finally be obtained. Here again, there would be no question of imposing from outside and by way of authority such specializations. But we sincerely believe that, if the spirit of international co-operation should freely develop as it should, and the action of the Committee were to be decisive in this matter, the institutes of themselves would come to demand, to recommend, and finally to realize these necessary specializations. We persist in thinking that the International Committee of Comparative Law is better designed than any other to promote and to facilitate such efforts, which will definitely involve a remarkable progress in the organization of comparative law institutes, which is to say in the last analysis, in the development and effectiveness of comparative law studies.

COLLOQUIUM ON INSTITUTES OF COMPARATIVE LAW

Resolutions

The representatives of the Institutes and Centers of comparative law invited to participate in the Colloquium organized at Munich by the International Committee of Comparative Law, after a discussion in which each participant has freely expressed his opinion, individually and without engaging the institution of which he was the delegate,

Considering that comparative law studies should be encouraged and developed in all their forms,

That the rational creation and organization of Institutes or Centers of comparative law is such as to assure efficaciously the development of comparative law,

That the progress of comparative studies is predicated on the establishment of regular relations and international co-operation among the comparative law institutions of the different countries.

I

Have unanimously decided to invite the International Committee of Comparative Law:

1) to establish and to distribute as widely as possible a list of Institutes or Centers of comparative law presently existing, as well as of institutions specializing in the comparative study of a particular branch of law, such methodical inventory to include all useful information concerning the organization, the directive personnel, the scientific resources, and the activity of such different Centers;

2) to request such Centers to report to it any subsequent modification of their organization and to communicate to it each year the essential points of their program of work, in order that a *répertoire* may be kept of such information at the International Committee of Comparative Law at the disposition of the different centers.

3) to investigate the practical means by which, taking account of documentary sources already existing, bibliographical information useful for the prosecution of comparative studies, and the annual reports mentioned in III (8), could be collected and distributed.

4) to organize an effective information service, such as to promote exchanges of professors or researchers, notably by centralizing and furnishing indications of

all kinds on such offers and requests as they may receive for such purposes;

5) to encourage or to invite (directly or on the proposal of national Centers or national Committees) the study, on an international basis, of certain subjects of current interest:

a) whether by the common work of a staff of researchers, belonging to different systems and assembled, during a sufficient period of time, in a specially designated Center, which shall assure supervision of the work;

b) or by the collaboration of the most qualified specialists from different countries invited to assemble for the purpose of a common study;

c) or by the organization of international meetings or colloquia relating to the subject selected.

II

In order to accomplish these ends, the participants in the Colloquium recommend:

1) that a Sub-Committee be constituted within the International Committee of Comparative Law, or a Commission be specially charged to accomplish the co-ordination of Institutes or Centers of comparative law, such Sub-Committee or such Commission to have the duty of enlisting the active collaboration of the national Committees or of comparative law Centers in a broad effort of international co-operation;

2) that the Institutes or Centers of comparative law of the different countries, insofar as possible, should be represented in the national Commissions of UNESCO or at least should maintain close contact with such national Commissions, with a view to endeavoring to exercise effective influence on the program of work of UNESCO.

III

The participants in the Colloquium have, on the other hand, declared the following *voeux*:

1) that an international Colloquium should be organized to study the problems relative to the application of the comparative method to legal sciences and, in a more general manner, to the methodology of comparative law;

2) that the national Committees of the International Committee of Comparative Law should undertake to promote the creation of chairs of comparative law and the inclusion in the universities of programs of obligatory courses enabling students to receive instruction in foreign systems, as well as those employing the comparative method;

3) that in each country and in case of need by means of an Institute especially chosen for the purpose, there should be organized instruction in comparative law intended for foreign students;

4) that, by all means and particularly during the period of vacation, the organization of instruction designed to perfect the training of foreign jurists by permitting them to receive locally training in the principles and the functioning of another system, should be favored;

5) that UNESCO should undertake to place at the disposition at the greatest possible number of Centers of comparative law, scholarships or sums making possible the sojourn abroad of jurists for a duration of three to twelve months; that the different national Centers should reserve as far as possible in their annual budget sums earmarked for said purposes;

6) that the Centers or specialized Institutes should endeavor to internationalize their activities by agreeing to receive foreign researchers interested by reason of their specialty;

7) that during the preparation, or even if possible at the examination of a thesis relating to foreign law, it should be possible for a professor of the country to which the thesis relates to be invited to give his advice concerning such work;

8) that the national Committees of the International Committee of Comparative Law, or in default thereof the Centers of Comparative law, should be invited to

have prepared annual reports of legal activity from the point of view of legislation, jurisprudence, and doctrine in their respective countries, and to send them to the address indicated by the International Committee of Comparative Law;

9) that UNESCO should undertake to facilitate by all useful means the procurement, by way of loan or sale, of foreign legal publications.

* * *

The participants in the Colloquium invite the Institutes or Centers of Comparative law to adhere to the preceding recommendations and to promote the realization thereof.

Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE
American Foreign Law Association

Adams v. Construction Aggregates Corporation, 125 F. Supp. 110 (S.D. N.Y. Oct. 13, 1954): civil law doctrine of apportionment of damages as rejected by common law; desirability of uniformity in maritime doctrines between U.S.A. and England.

Air Transport Assoc. of America v. Brownell, 124 F. Supp. 909 (D. Col. Oct. 11, 1954): no liability for extra compensation in connection with examination of airplane passengers arriving from foreign ports; ports of Hawaii, Alaska, and Puerto Rico not foreign ports within meaning of Act of March 2, 1931, 5 U.S.C.A. par. 342c.

Albanese v. Joseph R. Awad & Co., 133 N.Y.L.J. Jan. 26, 1955, 8 col. 3: triable issue as to delivery of goods to plaintiff's assignor in Venezuela.

Alfaro v. Alfaro, 132 N.Y.L.J. Dec. 3, 1954, 14 col. 5: conditions for recognition of Mexican divorce decrees.

Algemeene Kunstzijde Unie v. United States, 126 F. Supp. 916 (D. N. Carolina, Dec. 31, 1954): income tax refund allowed to Dutch corporation for loss of securities by vesting of its participation in American corporations as German - controlled enterprises; Dutch decree E-133 of Oct. 20, 1944 vesting corporate stock of Dutch corporations owned by German nationals; memorandum of agreement between Dutch corporation and Office of Alien Property of Aug. 9, 1947 (text at p. 921).

Altman, Petition of, 138 N.Y.S. 2d 336 (Surr. Ct. Nov. 30, 1954): right of infant over 18 years to control of his property under the laws and ordinances of the State of Israel.

American Swiss Potash Mining Corp. v. Brugger, 137 N.Y.S. 2d 229 (Sup. Ct. Nov. 27, 1954): contract in the German language to exploit potash deposits in Ethiopia; instruction to Barclay's Bank in Asmara, Eritrea to open letter of credit.

American TCP Corporation v. Shell Oil Company, 127 F. Supp. 208 (S.D. N.Y. Jan. 10, 1955): Dutch and British stock ownership in American oil company in anti-trust action for treble damages.

Anglo-Chinese Shipping Company v. United States, 127 F. Supp. 553 (Ct. Cl. Jan. 11, 1955): no liability of U. S. for use of Hong Kong corporation's vessel seized by Japan during war, for cable repair during military occupation of Japan; effect of Potsdam Declaration and Instrument of (Japanese) Surrender, 59 Stat. 1823 and 1733 (1945).

Arbona v. Kenton, 126 F. Supp. 366 (S.D. N.Y. Dec. 1, 1954); effect of acquisition of Commonwealth status by Puerto Rico on trial for violation of Smith Act.

Atlantic Mutual Ins. Co. v. N. V. Stoomvaart Maatschappij "Nederland", 133 N.Y.L.J. Jan. 21, 1955, 7 col. 3: loss of cargo delivered in Holland for transport to Indonesia; jurisdiction declined as undue burden upon foreign commerce.

Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (N.Y. Dec. 31, 1954): British wife's separation suit in England as repudiation of earlier New York separation agreement with British husband for her and children's support in England; application of English law under "grouping of contacts" theory of conflict of laws and under place of performance concept.

Autobuses Modernos, S.A. v. The Federal Mariner, 125 F. Supp. 780 (E.D. Pa. July 22, 1954): assignment of contract

for purchase of passenger buses governed by Cuban law; stipulation on validity of assignment.

Barkas v. Cia. Naviera Coronado, 126 F. Supp. 532 (S.D. N.Y. Dec. 28, 1954): salvage claim of non-resident Panamanian crew of Panamanian vessel for service rendered to another Panama-registered vessel; Writ of Foreign Attachment pending arbitration between masters of vessels in London before Arbitrator of the Committee of Lloyd's.

Bedo, Estate of Mary, 207 Misc. 35, 136 N.Y.S. 2d 407 (Surr. Ct. Jan. 7, 1955): authority of consular officer of Czechoslovakia to appear for his nationals even in absence of treaty.

Bennett v. Kazvini, 285 App. Div. 878 (1st Dept. Feb. 8, 1955): referee report requested as to extent to which Bank Melli Iran controlled and participated in previous proceedings.

Bittson v. Bittson, 138 N.Y.S. 2d 294 (Sup. Ct. Dec. 6, 1954): effect of divorce and custody proceedings in Portugal on New York separation action.

Borelli v. Rochester Transit Corp., 285 App. Div. 230, 136 N.Y.S. 2d 315 (3rd Dept. Dec. 28, 1954): suspension during war of statute of limitations affecting Italian alien enemy under sec. 27 N.Y. C.P.A.; Italian non-resident widow entitled to Workmen's Compensation; Peace Treaty with Italy, 61 Stat. 1476 (1947).

Bournias v. Atlantic Maritime Co., 23 U. S. L. WEEK 2427 (C.A. 2d Feb. 10, 1955): Panama Labor Code's one-year statute of limitations not applicable to seaman's libel against vessel for extra wages required by Panamanian legislation.

Brinn v. Winter, 126 F. Supp. 902 (D. C. Virgin Islands Dec. 31, 1954): power of Municipality of St. Thomas and St. John to tax cigarettes committed for delivery to Venezuelan importer.

Brownell v. Johnson, 23 U. S. L. WEEK 2265 (Cal. Super. Ct. Nov. 24, 1954): bonds owned by German insurance company and deposited with Berlin Bank lost after Soviet occupation; right of the United States which vested these bonds to issuance of duplicate bonds without furnishing security.

Brownell v. La Salle Steel Co., 128 F. Supp. 548 (D. Del. Feb. 4, 1955): Swiss corporation's agreement of 1933 with Illinois corporation on licensing American and Canadian patent rights allegedly violative of antitrust law.

Brownell v. South Pittsburgh Savings and Loan Association, 127 F. Supp. 783 (D. Pa. Jan. 21, 1955): no intervention of Pennsylvania administrator of deceased enemy (German) alien in enforcement of Alien Property Custodian's vesting order.

Burt v. Isthmus Development Company, 218 F. 2d 353 (5th Cir. Jan. 12, 1955): Mexican law on contract negotiation of western hemisphere trade corporation in Mexico; proof of foreign law in federal courts (p. 357).

Carestiato, Matter of Arcangelo, 133 N.Y.L.J., Mar. 25, 1955, 12 col. 1: proof of Italian succession law; withdrawal of funds by Italian Consul General.

Chien-Sen Tung, Estate of, 133 N.Y.L.J. Feb. 2, 1955, 7 col. 8: rights of distributees under the laws of China.

Kahiwa Hee Chung v. Ah See He, 216 F. 2d 614 (9th Cir. Oct. 29, 1954): cancellation of deed of aged Hawaiian woman on grounds of undue influence by daughter; affirming Territorial Supreme Court, 39 Hawaii 364.

Cohen v. Markel, 23 U.S.L. WEEK 2423 (Del. Ch. Feb. 23, 1955): Delaware Chancery Court's general equity powers inherited from High Court of Chancery of Great Britain; jurisdiction of divorced wife's suit for support of child (reference to English cases).

Commissioner v. American Metal Co., 55–1 U.S. Tax Cases CCH 54,656 (2d Cir. Mar. 15, 1955): Mexican mining law; production tax not in lieu of income tax for permissible U. S. credit.

Confeccoes Irmaos Saragossy Limitada v. Banco De Ponce, New York Agency, 133 N.Y.L.J. Mar. 10, 1955, 8 col. 2: collection of draft by Bank of Brazil; approval under Brazilian foreign exchange regulations; effect of revocation of instructions.

Cosentino v. International Longshoremen's Association, 126 F. Supp. 420 (D. Puerto Rico, Oct. 2, 1954): application of existing Federal law in Puerto Rico after enactment of Puerto Rico Act No. 600, 64 Stat. 319 (1952).

Couto v. Shaughnessy, 218 F. 2d 758 (2d Cir. Jan. 20, 1955): deportation of Portuguese seaman; qualification of official interpreter in Portuguese language.

Davis, Estate of Louisa B., 133 N.Y.L.J. Feb. 8, 1955, 8 col. 1: construction of Italian will specificially excluding Italian property; American will effective only as to property outside of Italy.

Davis v. Cunard Steamship Company, 135 N.Y.S. 2d 665 (App. Div. 1st Dept. Dec. 7, 1954): lack of prosecution of action by British subject for injuries sustained on vessel coming to United States.

de Moor, Estate of Johannes M., 133 N.Y.L.J. March 14, 1955, 9 col. 3: beneficiary rights of daughter residing in Germany under the law of Holland (the decedent's domicile); recognition of seizure of daughter's share as enemy-owned by State of the Netherlands under Brussels Agreement.

De Sairigne v. Gould, 133 N.Y.L.J. Mar. 14, 1955, 8 col. 8: effect of French currency exchange law on division of community property; foreign expert's conclusion on invalidity of unlicensed transfer.

Drews v. Eastern Sausage and Provision Co., 125 F. Supp. 289 (S.D. N.Y. Oct. 25, 1954): status during war of resident of Poland, enemy occupied territory; no application of tolling of statute of limitations (sec. 27 N.Y. C.P.A.) to derivative action of enemy stockholder.

Dumont v. American Export Lines, Inc., 137 N.Y.S. 2d 896 (City Ct. N.Y. Nov. 23, 1954): injuries incurred aboard vessel between New York City and Naples, Italy.

Dutch-American Mercantile Corp. v. Cotra Corp., 285 App. Div. 55, 135 N.Y.S. 2d 509 (1st Dept. Dec. 7, 1954): payment in New York "under reserve" for the receipt of Belgian Account English Pound Sterling, to be delivered at London Office of Netherlands Bank of South Africa.

Ecker v. The Atlantic Refining Company, 125 F. Supp. 605 (D. Maryland Oct. 26, 1954): domicile of naturalized citizen in Austria from 1929 to 1948; private sale of American real property vested by Alien Property Custodian.

Einhorn, Estate of Max, 133 N.Y.L.J. Jan. 10, 1955, 7 col. 7; March 7, 1955, 8 col. 4 (Surr. Ct.): taking testimony in the Soviet Union through letters rogatory; materiality of proposed testimony not shown; deposition taken of legatee in Germany.

Elizarraraz v. Brownell, 217 F. 2d 829 (9th Cir. Dec. 21, 1954): requirement of Mexican citizenship for membership in Mexican police force under Art. 32 of Political Constitution of the United States of Mexico.

Esquirol, Matter of, 285 App. Div. 138 (1st Dept. Dec. 31, 1954): disbarrment of attorney for procuring Mexican divorces.

Fenchel v. Oppenheimer, 133 N.Y.L.J. Mar. 31, 1955, 7 col. 4: retainer of attorney to recover funds located in Germany, Switzerland and Sweden.

Fikaris v. Atlantic Oil Carriers, Ltd., 133 N.Y.L.J. Feb. 10, 1955, 7 col. 3: action of Greek residents in England for injuries on Liberian ship bars action in New York for same relief.

Fox, Estate of Albert, 133 N.Y.L.J. Mar. 1, 1955, 7 col. 7: triable issues as to validity under German law of contested last will.

Frank, Estate of Leonard David, 132 N.Y.L.J. Dec. 16, 1954, 6 col. 7: distribution in accordance with Dutch law.

Fukomoto v. Dulles, 216 F. 2d 553 (9th Cir. Oct. 5, 1954): application in

Japan of citizen born of Japanese parents in Hawaii for recovery of Japanese (dual) nationality in 1943 not a voluntary act.

Funk, Matter of Lena, dec'd, 133 N.Y.L.J. Jan. 5, 1955, 12 col. 4 (Surr. Ct.): resident of Israel as sole residuary legatee; residents of Hungary as beneficiaries; revocation of will sustained.

Gager v. United States, 126 F. Supp. 181 (Ct. Cl. Nov. 30, 1954): breach of war surplus contract with Foreign Liquidation Commission, f.o.b. shipside Auckland, New Zealand.

Galvan, Application of, 127 F. Supp. 392 (S.D. Cal. Dec. 30, 1954): application of 1848 Treaty with Mexico permitting Mexican citizens who acquired property in territory ceded by Mexico to enjoy property guarantees equally ample as if property belonged to U. S. citizens.

General Motors Overseas Operations Division v. The Lichtenstein, 126 F. Supp. 395 (S.D. N.Y. Nov. 22, 1954): charter by Cuban company of West German vessel for shipment of automobiles to Havana, Cuba.

Golson v. Hearst Corp., 128 F. Supp. 110 (S.D. N.Y. Dec. 31, 1954): nonlibelous nature of magazine article advising against purchase of Japanese-made sewing machines being sold under American trade names.

Gonzales v. Trans World Air Lines, Inc., 133 N.Y.L.J. Mar. 17, 1955, 7 col. 5: no disposition of infant's funds located in New York through discretion of Family Relations Court of Superior Court of Puerto Rico.

Goodwill Industries of El Paso v. United States, 218 F. 2d 270 (5th Cir. Dec. 29, 1954): discretionary action on transportation and housing of Mexican workers, under Migrant Labor Agreement of 1951, U. S. Code Cong. and Adm. Service 1951, vol. 2, p. 2713.

Guam Service Games v. Shelton, 126 F. Supp. 335 (D. Guam, Dec. 9, 1954): no-competition provision in sales contract of coin-operated machines; word "district" in Guam Civil Code to be construed in light of California decisions since Guam statute was taken from California Civil Code.

Gudewicz v. John Hancock Mutual Life Ins. Co., 1954 Adv. Sheets 859 (Mass. Sup. Jud. Ct. Dec. 1, 1954): death of sailor in automobile accident on furlough during Korean conflict as occurring "in time of war, whether such war be declared or undeclared," within the meaning of double indemnity provision of life insurance policy. See Note, "The validity, construction, and effect of provisions in life or accident policy in relation to military service," 36 A.L.R. 2d 1018 (1955).

Hall v. Wright, 125 F. Supp. 269 (S. D. Cal. Sept. 17, 1954): Venezuelan, Canadian and Mexican corporations as claimants in action for unfair competition and patent infringement.

Hallissey, Matter of John J., dec'd, 133 N.Y.L.J. Mar. 7, 1955, 14 col. 2: probate of will by High Court of Justice of Ireland.

Handfield, Frank, 23 Tax Court No. 83 (Tax Court Jan. 17, 1955): Canadian postal card manufacturer, in selling in U. S. through news company, has "permanent establishment" in U. S. within meaning of Protocol to art. 3 of U.S.-Canada Tax Convention.

Harris v. American Intercontinental Fuel and Petroleum Company, 124 F. Supp. 878 (W.D. Pa. Oct. 7, 1954): damages for negligence arising in Italy; no judicial knowledge of Italian law which latter has to be pleaded and proven; trial judge and not jury determines state of foreign law.

Harris v. United States of America, 125 F. Supp. 536 (D. Virgin Islands, Nov. 8, 1954): Superintendent of Public Works for Virgin Islands is employee of U. S. government within Federal Tort Claims Act (Organic Act of the Virgin Islands of the United States, §23, 48 U.S.C.A. §1405v).

Herman v. Herman, 133 N.Y.L.J. Jan. 20, 1955, 6 col. 8: injunction restraining party from proceeding with Mexican divorce action though Mexican decree

would be invalid in N. Y. for lack of Mexican domicile.

Hungarian People's Republic v. Cecil Associates, Inc., 127 F. Supp. 361 (S.D. N.Y. Jan. 20, 1955): frustration of lease of consular premises by State Department's request to close offices question of fact precluding summary judgment for recovery of deposit.

Husseyni v. Rappaport, 127 F. Supp. 144 (D. Minn. Nov. 24, 1954): violation of Egyptian Currency Control Law through aliens' negotiation of check in Cairo; deposition of Egyptian barrister on Egyptian law; "public policy" under art. 135 and 136 Egyptian Commercial Code.

S/A Industrias Reunidas F. Matarazzo v. Compania de Vapores San Antonio, S.A., 126 F. Supp. 558 (S.D. N.Y. Dec. 13, 1954): increased carriage rate for shipment of wheat to ports in Brazil.

Jacobson, Estate of Yetta, 132 N.Y.L.J. Dec. 16, 1954, 8 col. 1 (Surr. Ct.): deposit of bequests to legatees in Romania pursuant to sec. 269, N.Y. Surrogate's Court Act.

Judels v. Ritter, 132 N.Y.L.J., Nov. 30, 1954, 7 col. 2: written interrogatories of resident of France.

Kamen v. Kamen, 135 N.Y.S. 2d 570 (App. Div. 2d Dept. Dec. 6, 1954): power of N.Y. court to declare void Mexican divorce decree obtained by husband subsequent to final N.Y. separation judgment.

Koeppel v. Koeppel, 132 N.Y.L.J. Dec. 9, 1954, 12 col. 3: dissolution of marriage in accordance with Rabbinical law.

Kovacs, Estate of Geza, 132 N.Y.L.J. Dec. 15, 1954, 6 col. 8 (Surr. Ct.): counsel fees for representation of Hungarian nationals.

Kropach, Estate of Max K., 133 N.Y.L.J. Jan. 17, 1955, 9 col. 4 (Surr. Ct.): N.Y. savings account of decedent, an American citizen who died in Iraq in 1949.

Kuerschner & Rauchwarenfabrik, A. G. v. New York Trust Company, 126 F. Supp. 684 (S.D. N.Y. Dec. 13, 1954): sole stockholders, residents and subjects of Canada and France, of nationalized Hungarian corporation not entitled to corporation's bank deposit since Alien Property Custodian's license does not determine title to property but merely conditions precedent to property transfer; possible application of sec. 977-b N.Y. C.P.A. to protect innocent stockholders of confiscated foreign corporation out of corporate assets situated in N.Y.

Kuerschner & Rauchwarenfabrik, A. G. v. Swiss Bank Corp., 126 F. Supp. 669 (S.D. N.Y. Dec. 21, 1954): set-off by Swiss bank against claim of sole stockholders of nationalized Hungarian corporation to corporation's bank deposit; no federal jurisdiction of claims between non-residents under Trading with the Enemy Act, as amended.

L'Aiglon Apparel v. Lana Lobell, 214 F. 2d 649 (3rd Cir. July 2, 1954): reciprocity rights for U. S. citizens against foreign nationals for unfair competition under sec. 44 of the Lanham Trade Mark Act, 60 Stat. 427 (1946); Note, 6 SYRACUSE L. REV. 200 (1954).

Leitman v. Leitman, 135 N.Y.S. 2d 518 (App. Div. 1st Dept. Nov. 30, 1954): wife's separation judgment conclusively establishing valid marriage when obtained after entry of Mexican divorce decree, thus eliminating necessity for declaration of marital status.

Liberty National Bank & Trust Co. v. Bank of America National Trust & Savings Assoc., 218 F. 2d 831 (10th Cir. Jan. 15, 1955): letter of credit issued to Union Bank of Switzerland; custody of documents by Swiss bank.

Littauer, In re L.'s Estate, 285 App. Div. 95, 135 N.Y.S. 2d 582 (3rd Dept. Nov. 24, 1954): enforcement of Cuban divorce decree directing husband to pay for the support of child.

Louknitzky v. Louknitzky, 123 Cal. App. 2d 406, 266 P. 2d 910 (Cal. App. 1954): Chinese and Hong Kong law on marital property acquired by parties while residing first in Shanghai and

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Lurcy, Estate of Georges, dec'd, 207 Misc. 179 (Surr. Ct. Oct. 22, 1954): will of American citizen domiciled in New York exempting his "French property"; holographic will on French property invalidly executed under laws of New York and France; executors authorized to administer all property including French.

Marsman v. Commissioner of Internal Revenue, 216 F. 2d 77 (4th Cir. Oct. 8, 1954): tax liability of citizen of Commonwealth of Philippines, resident of U. S., on Philippine income derived from wholly-owned Philippine corporation.

Matausch v. Moacanin, 133 N.Y.L.J. Feb. 1, 1955, 8 col. 5; Feb. 2, 1955, 8 col. 1: deposition to be taken in Vienna, Austria in English and foreign languages; only interrogatories framed in foreign language to be put to witness pursuant to sec. 309-a, N.Y. C.P.A.

McCloskey v. Chase National Bank, 285 App. Div. 148, 136 N.Y.S. 2d 55 (1st Dept. Dec. 21, 1954): assignment (in Turkish language) of interest in escrow fund to Turkish bank.

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Meissner v. Fischman, 206 Misc. 837, 136 N.Y.S. 2d 293 (Ct. Spec. Sessions N.Y. County, Oct. 29, 1954): paternity proceedings of alien residing in Israel who has lived for more than two years in U.S.; resident within sec. 64 N.Y. City Criminal Courts Act and sec. 122 N.Y. Domestic Relations Law.

Meyer, R. W., Limited v. Territory of Hawaii, 216 F. 2d 277 (9th Cir. Oct. 20, 1954): determination of title to land in Hawaii under royal patent signed by King Kala Kaua in 1888.

Mills Music v. Cromwell Music, 126 F. Supp. 54 (S.D. N.Y. July 29, 1954): agreement of 1947 in Tel-Aviv, Palestine for distribution of Hebrew compositions; infringement of copyright of "Tzena" song; requirements of British Copyright Act of 1911 continued in force in Israel (p. 75).

Moise Products Co. v. William Faendrich, Inc., 133 N.Y.L.J. Mar. 10, 1955, 7 col. 7: agreement entered in Italy for exclusive sale of cheese.

Morgan v. Drewry, 285 App. Div. 1, 135 N.Y.S. 2d 171 (1st Dept. Nov. 9, 1954): recognition of English judgment in New York upon principle of comity of nations; attorney's lien (sec. 475 N.Y. Judiciary Law) not affected by direct settlement of debtor's liability under English judgment in subsequent proceedings to set aside judgment against creditor in English courts.

Mulligan v. Oceanic Transport Corp., 125 F. Supp. 293 (S.D. N.Y. Oct. 25, 1954): settlement of compensation claims under Greek labor law no bar to action of Public Administrator against shipowner for wrongful death of Greek seaman.

Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13 (S.D. N.Y. Jan. 10, 1955): American and Bolivian corporations' suit against Swedish shipowner for shortage of shipments of iron bars from Belgium to Chile dismissed when bill of lading provided for filing of claims against carrier in Stockholm and for settlement according to Swedish law.

National City Bank of New York v. Republic of China, 75 S. Ct. 423 (Mar. 7, 1955): bank's counterclaim to recover on sovereign's defaulted treasury notes; no defense of immunity from jurisdiction.

National Savings & Trust Co. v. Brownell, 23 U. S. L. WEEK 2437 (D.C. Cir. March 3, 1955): power to seize enemy (German) owned property continued to exist in 1948 and 1951, inasmuch as war power under art. 17 Trading with the Enemy Act does not end until Congressional declaration or Presidential proclamation terminating war.

New England Industries, Inc. v. Youssefian & Cie., 284 App. Div. 953, 135

N.Y.S. 2d 229 (1st Dept. Nov. 23, 1954): examination before trial of French business enterprise by Russian-born officer resident of Paris, France, whose visa application had long been delayed.

Newtown Jackson Co., Inc. v. Barclays Bank (Dominion, Colonial and Overseas), 132 N.Y.L.J. Dec. 20, 1954, 10 col. 1; 133 N.Y.L.J. Feb. 15, 1955, 13 col. 3: discovery and inspection of documents on banking transaction in Nigeria, British West Africa.

New York County Lawyers Association, Matter of, 133 N.Y.L.J. Mar. 9, 1955, 7 col. 4: unlawful practice of Mexican lawyer in New York; agreement on limitation of his activities.

Oppenheimer v. U. S. Copyline, Inc., 133 N.Y.L.J. Jan. 19, 1955, 8 col. 2: depositions upon written interrogatories to be taken in England.

Orlow, Matter of Joseph, 132 N.Y.L.J. Dec. 10, 1954, 11 col. 7 (Surr. Ct.): fee for attorney appearing on behalf of Consul General of Republic of Poland for decedent's widow.

Panamusica Venezuela C.A. v. American Steel Export Company, 16 F.R.D. 280 (S.D. N.Y. May 24, 1954): action by Venezuela corporation to enforce agreement for granting exclusive sales agency to it in Venezuela; subpoena duces tecum for documents to be brought from Venezuela quashed.

Pathos v. Hobby, 128 F. Supp. 151 (D. Col. Feb. 4, 1955): Greek husband who had emigrated to U.S. in 1913 and died there in 1948, never brought his wife to U.S. but sent remittances to her from 1913 to 1941, when Greece became enemy-occupied; widow not entitled to social security benefits.

People v. Federico Cintron, 133 N.Y.L.J. Jan. 31, 1955, 14 col. 6: requirements of Puerto Rican burglary statute.

People (Lopez) v. Aponte, 133 N.Y.L.J. Feb. 24, 1955, 7 col. 5: full faith and credit to divorce decree of Superior Tribunal of the General Tribunal of Justice of the Associated Free State of Puerto Rico.

People ex rel. Ragona v. De Saint-Cyr, 207 Misc. 194 (Sup. Ct. N.Y. Jan. 11, 1955): custody of child to French father.

Phair v. L. Figueiredo S.A., 285 App. Div. 451, 137 N.Y.S. 2d 465 (1st Dept. Feb. 15, 1955): Brazilian corporation's release of shipping documents; forgery of consular invoices for exportation of flour from N. Y. to Brazil; seizure of flour as contraband by Brazilian government.

Prevost, Estate of Roger, 133 N.Y.L.J. Feb. 16, 1955, 8 col. 2 (Surr. Ct.): status of deceased's sister, as universal heir of their father under the law of France, his domicile.

Public Administrator v. Schneider, 133 N.Y.L.J. Mar. 10, 1955, 7 col. 3: commission to solicitor in Ireland.

Quinones, Matter of Eugene, 132 N.Y.L.J. Dec. 20, 1954, 10 col. 2 (Surr. Ct.): determination of death of absentee seaman in U.S. Navy last seen in 1946 in Manila, Philippines.

Reaume v. United States, 124 F. Supp. 851 (E.D. Mich. Aug. 9, 1954): dual national of Canada and U. S. expatriating himself from U.S. by declaration of allegiance to King of Great Britain; Canadian Nationals Act of 1921 (1927 Rev. Stat. Can. Vol. I Ch. 21 p. 347).

Reiman v. Von Feldau, 133 N.Y.L.J. Feb. 21, 1955, 8 col. 1: deposition taken before American Consul in Vienna, Austria.

Reisman v. Reisman, 132 N.Y.L.J. Dec. 27, 1954, 1 col. 7 (App. Div. 2d Dept.): proof of substantive law of Austria on recovery of money expended for benefit of infant.

Rosenbaum v. Rosenbaum, 285 App. Div. 427 (1st Dept. Feb. 23, 1955): injunctive relief for wife against Mexican divorce, in view of harm to plaintiff by even invalid foreign decree.

Rubin, Estate of Alexander, 133 N.Y.L.J. Feb. 28, 1955, 8 col. 8 (Surr. Ct.): Estonian law on distribution of estate.

Seery v. United States, 127 F. Supp. 601 (Ct. Cl. Jan. 11, 1955): Austrian

estate of U. S. naturalized citizen used for officer's club after end of hostilities; owner entitled to just compensation under Fifth Amendment to Federal Constitution though property located in "enemy territory"; recovery not barred by Agreement between U. S. and Austria of June 21, 1947, 61 Stat. 4168, providing for full settlement of all obligations incurred by U. S. armed forces.

Seidenberg v. Seidenberg, 126 F. Supp. 19 (D. Col. Dec. 1, 1954): invalidity of spendthrift trusts under English law.

Siegelman v. Cunard White Star, Ltd., 23 U. S. L. WEEK 2442 (2d Cir. Feb. 17, 1955): provision in transatlantic steamship ticket sold in New York by English steamship line that all questions be "decided according to English law" makes English law applicable, in admiralty suit for injuries suffered on high seas, as to whether steamship line waived one-year limitation period set by ticket; application of federal choice-of-law rules.

Singh v. Banes, 277 P. 2d 89 (Cal. App. 3rd Dist. Dec. 6, 1954): validity of title to agricultural land which was conveyed by members of the Hindu faith and natives of India bona fide and not merely colorable for purpose of evading California Alien Land Law.

Site for Hunts Point Sewage Treatment Works, In re, 138 N.Y.S. 2d 118 (Sup. Ct. Nov. 1, 1954): discussion, in condemnation proceedings, of British Acts of Trade of pre-Revolutionary times.

Smith v. United States, 126 F. Supp. 433 (Ct. Cl. Nov. 30, 1954): no recovery for seizure to Army finance officer who had exchanged in France and England Dutch guilders obtained by him in black-market operations for American currency in his custody.

Standard-Vacuum Oil Company v. United States, 127 F. Supp. 195 (Ct. Cl. Jan. 11, 1955): no recovery for destruction of petroleum products remaining on Cebu, Philippines, when Japanese army was about to land on April 10, 1942, but only for products appropriated by armed forces for their own use.

Stephen v. Zivnostenska Banka National Corp., 133 N.Y.L.J. Mar. 2, 1955, 7 col. 5: receivership over assets of nationalized Czechoslovakian bank (sec. 977b N.Y. C.P.A.); Czechoslovakian Law No. 31 of 1950 on liquidation of bank; effect of termination of Czechoslovakia's membership in International Monetary Fund as of Jan. 1, 1955.

Taormina v. Taormina Corp., 109 A. 2d 400 (Del. Ch. Nov. 24, 1954): Italian law of distribution of estate of American citizen who died in Italy with last domicile in Mississippi, is according to law of decedent's nationality, under principle of renvoi (art. 23, 30 Italian Civil Code); no acquisition of Italian nationality by military service under coercion; daughter not entitled to invoke "forced heirship" provisions of Italian law applicable only to estates of Italian nationals.

Teneria "El Popo", S. de R.L. v. Home Insurance Company, 207 Misc. 84, 136 N.Y.S. 2d 574 (Sup. Ct. Dec. 16, 1954): common-law burden by Carriage of Goods by Sea Act for loss of goatskins in shipment from Brazil to Mexico City and transshipment from New York to Tampico, Mexico.

Toohill v. Cunard S.S. Co., Ltd., 23 U.S. L. WEEK 2442 (D. Mass. Feb. 24, 1955): English liner's one-year limitation period set in "box" of ticket only and not forming part of contract must, to be effective, be brought to passenger's knowledge.

Book Reviews

A Register of Legal Documentation in the World. Catalogue des Sources de Documentation Juridique dans le Monde. Prepared by the International Committee of Comparative Law, with the support of the International Committee for Social Science Documentation. Paris: Unesco, 1953. Pp. 362.

This inventory of the current sources of law throughout the world is an extremely useful tool for the study of law on a comparative basis. The publication is unique and represents an effort to provide the model for such a compilation of sources rather than the final word. It does not purport to cover historical materials or legal treatises. Its success will ultimately depend upon the constructive criticism of readers and the continuation of the plans for further comparative documentation. The Harvard Law Library has checked the material for certain countries in the Register. It appears to be a reliable reference book, although some of the countries are more completely documented than others.

Prior to the Paris meeting of the International Committee of Comparative Law at which the Register was conceived, discussion of foreign law documentation centered on the type of information which would be most useful to legal scholars, teachers, and practitioners. Opinions from the leading comparative law experts in the United States were obtained by circulating a number of questions based on the questionnaire of the Subcommittee on Documentation of the International Committee. The fundamental issue was whether to prepare a basic index of foreign law sources or a series of annual surveys (trend reports) for each country, the practitioners favoring the catalogue-index of sources.

In the discussions which preceded the establishment of the plan to publish the Register, it was pointed out that such a basic work would help comparative jurists to develop national trend reports in the future. The Register was conceived as a first step, to be followed by a bibliography of legal literature, plans for introductions to the law of particular countries and for supplemental trend reports or annual surveys, and eventually the establishment of centers of documentation in each country.

As indicated in the preface, the Register was prepared by a commission composed of Marc Ancel of France, William Sprague Barnes of the United States, Kurt Lipstein of the United Kingdom, and Felipe de Sola Cañizares of Spain. They were assisted by correspondents in the various countries.

The task of completing certain countries and bringing together the materials in a uniform system of presentation was carried out by the Secretary General of the International Committee, René David.

The Register contains some inaccuracies and is not complete with respect to particular subjects, e.g. materials on taxation, but its shortcomings are more than overcome by its scope and arrangement. Current sources are given

for information on Constitutions, Codes, Legislation, Court Decisions and Centers of Legal Documentation, including libraries and law schools. Legal periodicals, bibliographies and, where available, digests, encyclopedias, and other research tools are also listed. The scope of coverage is apparent from a study of the Index, which shows that every jurisdiction in the world is included from Aden to Zanzibar,—a total of over two hundred separate states. The material under each state varies from a single line each for Qatar, Nepal, and the Cameroons to thirty-three pages for the United States and thirty pages for the French Union.

It should be noted that the Register presupposes a knowledge of both English and French. For all the countries which use other languages, the original titles are listed with translation into French, save in the case of those in Spanish, German, Italian, and other well-known languages. All of the descriptive information is given in French except for the English-speaking countries. Unfortunately, there are certain countries, notably those of the Arabic language, in which the exact titles are not given but only the French equivalent.

When the language presents difficulties in terms of proper citations, abbreviations are extremely useful, for example in Denmark and Greece, and it is unfortunate that similar listings of much-used abbreviations are not available for such countries as Turkey, the Netherlands, and the U.S.S.R. In the section on the United States, the form of citation is listed in brackets after the title of the particular source, rather than providing an over-all alphabetical list of abbreviations, which would require substantially more space. Such a list would have proved useful to foreign lawyers who wished to decipher the citations used in American materials, whereas this system merely supplies the user of a particular source with a proper method of abbreviation.

Although there is much uniformity of presentation, certain countries, such as Egypt, include more detail than others. In some cases, this situation resulted from inability to obtain information, as in the case of China and Korea, but in general, the discrepancies seem to have resulted from the views of the individual collaborators.

The listings of legal periodicals include only those which are being published currently, except in certain countries, notably Belgium. The description of the periodicals in Spain is an excellent example of an adequate current listing. Librarians would find the Register more useful as a source if all significant periodicals were listed including those which have ceased publication. Limitations of space have dictated the decision to omit such periodicals from the regular list, but they might be included in short form, giving only the name and dates.

In listing the institutions which are centers of legal research, it might be more practical to divide them according to subject matter, as in Japan, rather than by cities, as in Germany. Although the British Commonwealth countries have been well-reported, more detailed description of the centers of legal documentation would be useful, indicating the address and the scope of library

facilities available. It might also be advisable to include the office to which requests for legal information should be addressed.

In certain cases, as for example Southern Rhodesia, it would be helpful to include reference to the relevant sources to be consulted for laws still in force but promulgated prior to the establishment of the new state. When the current source of legislation has developed out of previous compilations as in the statutes of the United Kingdom, the background information might better be included as a note to the current source rather than as separate listings.

The majority of the loose-leaf publications available in the United States are erroneously listed on page 322 under Federal Administration Materials, instead of on page 336 under Loose-Leaf Services. This type of information has also been made available for other countries, as for example the *Juris-Classeur* in France (page 286) but compilations in loose-leaf form, such as *Das österreichische Recht* by A. Heinl (1948), are not included.

Occasionally one finds that text book writers have been listed, even though their works are not in the nature of commentaries on the basic legislation. Where such sources are practically the only means of finding the law, as in the case of the Channel Islands of Guernsey and Jersey, this departure from the rule against bibliography may be warranted. But even in such a case, the difficulty of choice and the danger of having too many purely historical references would seem to justify the omission of literature in the Register. Institutional writers have been included where their writings are regarded as taking the place of codification, as in Scots law, but it is not an easy matter to draw the line between codification, commentary, and treatise. If each country were encouraged to publish a legal bibliography such as the excellent *Bibliographia Juridica Fennica* (Finland), it would be sufficient to refer to such compilations rather than attempting a world legal bibliography at this stage.

The Register stands as an important foundation for research in comparative law. There are so many additions and corrections made necessary by the current developments in legal documentation that it would be advisable to publish supplements each year. A second edition could be published when the number of supplements makes it difficult to use the basic work. For preparing these supplements, individuals and institutions in each country should be encouraged to participate in order to realize the ideal toward which the present volume is such a significant step.

One important addition is recommended. The sources of law on particular countries which are most accessible in translation are the compilations prepared by the United Nations and its specialized agencies. For example, the Legislative Series of the International Labor Office is well-known for its excellent translations not only of labor legislation but of laws in related fields, such as social security and cooperative associations. There are many other sources on civil rights, fiscal laws, welfare legislation, transportation regulations, and housing ordinances within the United Nations. National laws on health, aviation and agriculture are collected by the specialized agencies. All of these

materials should be made available by proper reference and description of their contents if the Register is to be fully effective as a source book.

W. S. BARNES*

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ASCARELLI, T. *Lezioni di Diritto Commerciale. Introduzione.* Milano: A. Giuffrè, 1955. Pp. vii, 315.

ASCARELLI, T. *Saggi di Diritto Commerciale.* Milano: A. Giuffrè, 1955. Pp. xv, 619.

VAN RYN, J. *Principes de Droit Commercial.* Tome Premier. Bruxelles: Emile Bruylant, 1954. Pp. viii, 549.

The second revised edition of Ascarelli's lectures at the law school of the still famous University of Bologna furnishes a useful introduction, with a background of comparative law, for students of the present-day commercial law of Italy. Italy is one of the countries, following the example of Switzerland and of the common law, that has sensibly abolished any fundamental distinction between "civil" and commercial law, abandoning a separate commercial code and providing in the Civil Code of 1942, the unification of the whole basic law of obligations. This, Ascarelli believes, will eventually be followed everywhere.

What then shall be presented to a student as the content of general commercial law, apart from specific fields such as admiralty, banking, negotiable instruments, insurance, companies, etc.? Ascarelli finds the answer to be the exposition of the concept of the *entrepreneur*, in the broadest sense of that term (*imprenditore*—any one engaged in business for production or distribution and intermediaries, such as brokers, forwarders, etc.), of the enterprise (*impresa*), and of the typically Italian concept of the *azienda*. These concepts are forming the basis of present-day thinking in other Latin countries. The former troublesome distinctions between acts of commerce and civil acts were struck out by the Code. The concept today is of economic activity, not trade.

Each chapter of the book is preceded by a useful brief bibliography. The first five chapters trace the history and evolution of the law in a masterly resumé, saving one or two inconsequential errors as to English law. The remainder of the book deals with the above mentioned concepts of the entrepreneur and the enterprise, constituting a commentary on the code, with ample citations of recent Italian decisions.

The code differentiates between different classes of *imprenditore*, the term corresponding roughly to our idea of business man in the broadest sense. The concept of *azienda* (art. 2555 of the Code) is one not so readily grasped by an American lawyer; the author's exposition furnishes the necessary enlightenment. The *azienda* is made up of the organized assets, disregarding liabilities, used by the entrepreneur in his business, whether or not he is the owner of them. It includes the goodwill to which a large exposition is devoted (pp. 234

seq.). The concept of *imprenditore* is unitary, whereas there may be a plurality of *aziende* in different locations. The Spanish writers call the *azienda "fondo de comercio,"* giving it a different content than the French *fonds de commerce*; Goldschmidt prefers the term *hacienda comercial* (7 *Sociedades Anónimas*, Montevideo, November 1952, 482–503). Contracts of adhesion are also well discussed (Ch. XVI).

Of interest is a law of 1950 (p. 242) protecting a tenant against competition by the landlord on termination of the lease. Decisions and legislation in regard to contractual provisions against competition furnish some contrast to our law. Strikingly different also are the decisions as to undisclosed agency (p. 155) and as to the probative value of books of account. The book contains a wealth of stimulating material.

The "Saggi" by the same author is a collection of 21 articles published in law reviews 1952–1954. Like all such compilations, they vary in length, interest, and value to an outsider. Some are repetitious, others argumentatively diffuse —traits admirably absent from the "Lessons." Space precludes adequate review. The more important articles deal with the historical evolution of commercial law and unification, unfair competition, the notion of industrial property (and herein of monopoly versus competition), corporations, and negotiable instruments under the new Code. There is one article on Judicial Interpretation and the Study of Comparative Law. Not startlingly new, it contains many shrewd observations, starting out with a quotation from Holmes, on the diversity of methods of interpretation; it stresses the creative function of the courts and the basic weakness of all legislation that assumes to make interpretation needless; it emphasizes the value of comparative law as opening up a wider horizon of larger social relations, and the broadening of experience and the essential role of world history as the basis for interpretation; local history is insufficient. American "law in action," he uses the phrase in English, can furnish a guide to the Continent.

Van Ryn does not share Ascarelli's view of the desirability of unifying civil and commercial law. He ranges himself with the advocates of the autonomy of commercial law, especially in view of the encroachments of administrative law. It is curious that he does not refer to Italy or Switzerland. In fact, it is the defect of this book, from the viewpoint of this Journal, that it ignores comparative law. There are a few scanty references to Swiss and German law, and one to English law. Belgian law is historically so intertwined with French law that the latter, copiously referred to, cannot be considered foreign. This omission is all the more strange because Belgium is not exaggeratedly nationalistic, and its foreign trade *per capita* is one of the highest in the world.

The common lawyer is naturally more sympathetic to the Italian point of view and is not convinced by Van Ryn's arguments. In fact, later passages in the book highlight the absurdity of the "byzantine, illogical" distinctions, as he calls them, between what is and is not commercial; e.g. a garage is not commercial, but if it includes a filling station, it is; an insurance company

receiving premiums is commercial; a mutual insurance company (except a maritime mutual) is not; a geneologist is a "*commerçant*," but not a lawyer; a broker is, but not a traveling salesman; on the other hand, a local agent is a *commerçant*. Agricultural and mining enterprises are not subject to commercial law. The professions are excluded from its realm, but if an architect undertakes building or an engineer exploits his own patents, they lose their immunity. Artisans are excluded for special reasons, but if a taxi driver owns his cab, he becomes a *commerçant*. "Acts of commerce" are equally confusing. The purchase of an automobile by a business man for his business is an act of commerce, but not of a pleasure car. The purchase of securities for speculation is an act of commerce, but not if for investment. Such distinctions, it seems to this reviewer, inevitably must flow from any hard and fast cleavage between civil and commercial law.

The distinctions, as they exist, are of great practical importance. The competence of the commercial courts, and subjection to bankruptcy, turn on these distinctions; the applicable rules of evidence and of interpretation differ. Nor is the law well settled: the authorities are in conflict as to whether a person continues to be a merchant during liquidation and as to whether one who conducts business through a dummy, without fraud, is a merchant. Our theory of undisclosed agency would be helpful abroad.

But he agrees with Ascarelli that the traditional concepts of "merchant" and of "acts of commerce" are outdated; that "economic law" would be a better title for the subject, although the liberal professions, workmen, and agriculture are excluded. He is in accord that the enterprise and the entrepreneur ("*chef d'entreprise*") are the main elements. The positive law is defective in not giving full legal status to the "enterprise."

The Commercial Law in Belgium, though statutory, remains uncodified; only a bare skeleton is left of the French Code of 1808. Commercial institutions (following Hauriou's theories) are an additional source of law.

Married women still require the express authorization of their husbands in order to carry on business, and it is disconcerting to learn that the exercise of trade by aliens is subject to strict requirements and a license by the Ministry of Economic Affairs granted upon the advice of a special Council for Aliens (p. 98).

The book is of extraordinary interest, especially in regard to recent legislation in Belgium, and will answer nearly all questions a lawyer would be likely to ask. Only for details would he need to consult the longer works.

A few passing observations will be of interest. The author opposes limited liability for the individual trader, though referring, secondhand, to legislation abroad authorizing it (p. 100). The Belgian courts, to the author's regret, have rejected the possibility of a one-man corporation; the corporation is automatically dissolved if all the shares pass into single ownership (pp. 219, 241). By the theory of simulation—fictitiousness—the same results may be reached as by our "piercing the corporate veil" (pp. 224, 225). There is a good chapter on

unfair competition. Violation of an injunction is not punished by contempt of court but by action in the criminal courts (p. 168). The law as to the validity of contractual obligations as to competition, e.g. on the sale of a business, seems fairly close to our own. It is lawful for a manufacturer to impose a minimum or fixed price for resale of his products, but he may not discriminate against some purchasers (p. 171). In some respects, the Belgian law as to unfair competition seems better than ours.

Business tenants are protected by a recent law (April 30, 1951) against unfair action by landlords (pp. 184 *seq.*); *cf.* Ascarelli, *supra*). It does not give the tenant a right to renewal of the lease, but a right to damages for non-renewal. Each lease must be for a term of at least 9 years, subject to two renewals, and to revision every three years. The tenant has the right to make alterations and cannot be deprived of the right to assign the lease when he sells the business; he may surrender the lease at the expiration of any three-year period upon 6 months notice. Wide discretionary powers are vested in the court. The statute has already given rise to considerable litigation judging by the number of cases cited in the notes. The author complains that the provisions as to damages, the most complicated part of the statute, are not clear (p. 200).

Freedom of enterprise, dating from the French Revolution, is still a cardinal principle of Belgian law (p. 111 *seq.*), but not being incorporated in the Constitution has been increasingly subject to restrictions in recent years. A law of September 20, 1948 and supplementary enactments (p. 116 *seq.*) provide for intervention by a mixed board of labor and management (*conseil d'entreprise*) vested with important powers.

The Belgian "*fonds de commerce*," a relatively recent theory not found in the Code but a creation of the courts, comprises assets but not liabilitities, but not all assets. Bills and accounts receivable do not enter into it. It is recognized as an entity apart from the individual items which make it up—an incorporeal property—substantially corresponding to our "goodwill" or rather to the ensemble of elements that make up goodwill (*cf.* Ascarelli, *supra*).

The second part of this introductory volume deals with partnerships and companies. The partnership, as in most civil law countries, is accorded juristic personality, which leads to the reflection: is it not time that we too adopted completely and not merely half-heartedly the entity concept of a partnership? The Belgian law however, unlike the French, does not give the "civil" partnership juristic personality. But "civil" partnerships may adopt the form of commercial partnerships, under a 1926 statute, poorly drafted (p. 106).

The stock company is no longer, as the old view had it, a matter of contract. It has become mechanized, institutionalized (p. 205 *seq.*). The numerous corporation statues were codified by a Royal Decree of 1935. The author follows the generally recognized classification into "*sociétés de personnes*" where the *intuitus personae* is predominant, and the "*sociétés de capitaux.*" The former are the general and the limited partnerships. They need not detain us, being in general similar to our law. It is to be noted however, that not all general part-

ners can bind the firm; only those authorized by the articles as managing partners (*gérants*) can do so. The limited partnership follows the old lines. The absurd and confusing rule of our Uniform Act that a person may be both a general and a special partner has not been followed. But the limited partnership is today of little practical importance; the form of limited partnership with share capital, which we did not adopt, still less so.

The stock company with which the remainder of the book deals, is beset with the same general legal problems with which we are familiar at home. The original 1873 law, inspired by the English law, has been frequently amended, chiefly with a veiw to the protection of minority shareholders. The underlying concepts are out of date. The author finds that legal safeguards are still insufficient. I may point out, however, (the author does not) that Belgian companies are honestly and efficiently managed and perhaps such a climate of financial euphoria is better than legislation. To organize a corporation, seven incorporators are required, the entire capital must be subscribed and 20% paid up (p. 334 *seq.*). Failure to comply with all requirements does not entail nullity (p. 335). Promoters may be criminally liable for watering stock (p. 337). Shares without par value are permissible (p. 348). Shareholders cannot be deprived of voting rights (p. 353). Shares issued for property are "blocked;" i.e. if to bearer, they must remain on deposit with the company for two years; if registered, they are not fully negotiable, but are subject to special requirements. Reasonable restrictions on transferability of shares may also be incorporated in the by-laws (p. 364 *seq.*). Pre-emptive rights, for instance, may be permitted and restrictions as to the nationality of assignees may be imposed. It seems to be a current practice in Belgium to issue short-term bonds to shareholders in lieu of our stock dividends (p. 371). There are no statutory restrictions on bond issues, except that bonds for less than 1000 francs are prohibited, and there are restrictions as to lottery and premium bonds; and public issues of both stocks and bonds are subject to strict regulations. Trustees for bond issues seem to be unknown. There is the same divorce between ownership and management in large corporations that exists with us. Shareholders do not attend meetings, yet the law has not been adapted to meet the facts. The system of audits, as practiced in Belgium, he finds virtually useless. Recent laws of July 22, 1953, and December 14, 1953, provide for chartered accountants, but the reforms are timorous and half-hearted.

The volume under review is only the first; two others are to come later. This first volume does not include the limited liability firm. The reader meanwhile may obtain full information as to the law, if Belgian books are not available, from the work by de Sola Cañizares and Aztiria reviewed in this issue.

I make no apology for the length of this review. I have deliberately used it as a vehicle to convey to the American lawyer, business man and investor, some inkling of Italian and Belgian law of current practical importance.

PHANOR J. EDER*

* Board of Editors.

DE SOLA CAÑIZARES, F.—AZTIRIA E. *Tratado de Sociedades de Responsabilidad Limitada en Derecho Argentino y Comparado.* 2 vols. Buenos Aires: Tipográfica Editora Argentina, 1950–1954. Pp. 717; 585.

SIQUEIROS, P., *Las Sociedades Extranjeras en México.* México: Imprenta Universitaria, 1953. Pp. 199.

The hybrid and extremely useful form of business organization, the limited liability firm, is a triumph of comparative law in action. Spreading from the German G.m.b.H. of 1892, itself in part inspired by the English private company, it has spread to half the world and has been introduced into countries where the organization and functioning of stock corporations has been unduly restricted or hampered, and into several, such as Italy, Switzerland, and Cuba where there was no pressing need for it. This book by the indefatigable comparatist, de Sola Cañizares, and a Buenos Aires practitioner, is the most comprehensive treatise on the subject ever attempted.

The work begins with a historical introduction, including the history of limitation of liability in general, a general resumé, the history of the Argentine statute, an extensive bibliography (vol. 1, pp. 64–103) and interesting graphs showing rapid growth in the Argentine. The only defect of the history is failure to refer to the Pennsylvania statute which antedated the German. Then follow chapters on Juristic Personality (Ch. 1) and on Nationality (Ch. 2). To strengthen their denial that foreign corporations are not entitled to diplomatic protection, the Argentine has been foremost in combating the notion that juristic persons can have nationality. While the Argentine courts, in contrast to those of Mexico (*infra*), did not deny the existence of nonregistered foreign corporations, they provincially refused to recognize associations of a type not authorized by their own laws (p. 166); hence, prior to the adoption of the special statute, foreign limited liability firms could not do business there.

The book then deals exhaustively (chapters 3–18) with all legal aspects of such firms under Argentine law, each chapter closing with a lengthy statement of the law in foreign countries and the authors' own views as to the best solutions. Twenty-one countries are fully covered, with references to a score of others, with ample citations of statutes and text-books. The appendices include, bringing the book down to date, pertinent parts of the new Commercial Code of Honduras, the new law (1953) of Spain, and recent amendments in France, Colombia and Japan. The final chapter (19) is a General Comparative Survey.

The book is well organized and marked by sound practical sense. Explanations of the English law in regard to such subjects as *ultra vires*, debentures, winding up will be useful to Spanish readers, although the authors agree that the English private company, which is fully analyzed, is unlike the limited liability firm in many essentials. The book will also be useful to the American corporation lawyer for its incidental treatment of stock companies, especially in Argentina, the case law being fully discussed; e.g. provisions exonerating directors from liability are void (p. 127), as are restrictions on the right to examine the books and accounts (p. 179), although refusal to inspect may be

justified by "anti-social" conduct (p. 181). Representative actions are permitted (p. 130).

The utility that can be derived from this foreign institution to help us solve the problems of the close corporation has been frequently pointed out (references in my "*Limited Liability Firms Abroad*," 13 Univ. of Pittsburgh L. Rev. (1952) 193). But above all, knowledge of this favorite form of business organization is essential to business men contemplating activity or investment abroad and to their lawyers, and this book furnishes an excellent guide.

Siqueiros' book is of more limited scope. It deals first with the position of foreign corporations in private international law generally, examining the history of the various theories and advocating the more modern liberal theories. He has been influenced by Rabel and, as is natural for a Harvard Law School graduate, is well acquainted with other American authorites. He then goes on to a fuller discussion of foreign corporations in Mexico. It is disconcerting to learn, contrary to what we had supposed, that the ghost of the Palmolive case and other cases in the Supreme Court of Mexico that followed it, has not been completely laid at rest by subsequent legislation and decisions. This shocking case, it will be recalled, carried the doctrine that a corporation is a fiction of the law to such an extent as to deny that an unregistered foreign corporation, even though not doing business in Mexico, could have any existence and therefore could have no standing in court. The book then examines in detail, under the various special statutues as well as the general laws, the restrictions imposed on foreign corporations and their tax status. The book will answer many questions, but not all. While critical of the former court decisions, it does not seem to have occurred to Lic. Siqueiros that much of the legislation too could be advantageously revised, to the benefit of Mexico's economy. The formalities for obtaining authority to do business, in the fields where foreigners are permitted to engage, are needlessly complicated, and many of the prohibitions could be eliminated without danger.

The preface is by Dr. Eduardo Trigueros S. His untimely death a few weeks ago is mourned by his many friends. He had been a leader in Comparative Law activities in Mexico, a professor of the subject, and an active practicing lawyer.

PHANOR J. EDER*

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* Board of Editors.

SCHMIDT, T. S. *Kvalifikationsproblemet i den internationale privatret.* Copenhagen: Gads Forlag, 1954. Pp. 221.

Mainly concerned with logical reasoning, this contribution by Torben Svenné Schmidt to the international debate on the principles of the conflict of laws, is not a typical example of modern Scandinavian legal literature, which is primarily descriptive. It is characteristic of the outlook of Scandinavian jurists that Malmström, who wrote the first major representation of

the characterization problem,[1] dissociated himself from the theoretical "logical" solutions of the problem. The questions of interpretation in the conflict of laws are not, according to Malmström, in principle different from questions of interpretation in other areas of law and should be solved on the basis of considerations regarding the social desirability of the results to which the different interpretations lead. Malmström rejects the idea that the question of characterization is a preliminary question peculiar to the conflict of laws.

Malmström's views have been approved by a number of writers.[2] Although several authors[3] find it necessary to deal with the question of characterization as a preliminary question to be decided in accordance with the law of the forum, they do not deal with the question as one which should be answered on the basis of logical considerations, but as a problem which should be solved with due regard to the social policies involved.

An exception is the more speculative theory of Torsten Gihl[4] which is based on logical deductions from a particular conception of the nature of the conflict of laws. Gihl's theories concerning the general principles of the conflict of laws are inspired by the writings of the Italian Roberto Ago. The theory of characterization defended by Schmidt is a further elaboration of the theories of Ago and Gihl. The close relationship between Schmidt's theory and the theories of Ago and Gihl makes it possible to give a common account of the leading thoughts of the three writers with references to their writings.[5] The theory rests on a number of postulates regarding the nature of the conflict of laws and the legal systems with which the conflict rules are concerned:

The legal systems of the individual states are autonomous and original.[6]

The validity of the individual legal system is universal. The validity of the rules of the legal systems is not limited in space.[7]

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[1] Åke Malmström, Det s.k.kvalifikationsproblemet inom internationell privaträtt, Uppsala Universitets årsskrift (1938) nr. 5. (Recueil de travaux publié par l'université d'Uppsala).

[2] Östen Unden, (1940) Tidsskrift for Rettsvitenskap, 215 f.

Dennemark, (1943) Svensk Juristtidning, 679 f.

Karlgren, Kortfattad Lärobok i Internationell Privat och Processrätt (Lund 1950) 57–63.

Wengler, (1944) Zeitschrift für vergleichende Rechtswissenschaft, 322 f.

[3] Borum Lovkonflikter, 3rd ed. (Copenhagen, 1948) 75 f.

Malmar, "Ytterligare bidrag till kvalifikationsproblemet i internationell privaträtt" (1944) Nordisk Tidsskrift for International Ret, 5–41.

[4] Torsten Gihl, Den Internationella Privaträttens Historia och Allmänna Principer, Stockholm, 1951 (Reviewed by Erik Siesby, (1953) Nordisk Tidsskrift for International Ret, 58–62).

[5] References are made to Gihl, *op. cit. supra* note 4, cited "Gihl", Roberto Ago, "Règles générales des conflits de lois," 58 Recueil des Cours de l'Academie de Droit International, (1936 IV) 247–469, cited "Ago."

[6] Schmidt, 121–122, 161, 168, 218; Gihl, 4, 7, 275; Ago, 261 (at note 1).

[7] Schmidt, 218; Gihl, 7–8, 276; Ago, 261, 297: ". . . une conséquence nécessaire des principes de l'exclusivité et de l'universalité de l'ordre juridique . . ."

Any legal system regards only its own rules as legal, while the rules of foreign legal systems are regarded as pure facts without legal character.[8]

The function of the conflict rules of one legal system cannot be that of creating limits to the validity of each of the many systems; it is the function of the conflict rules to regulate factual relations which contain features foreign to the material life of the country.[9]

The main reason why Ago stressed the autonomous character, the originality, and universal validity of the legal systems was a negative one, namely, to argue against the so-called internationalist theories; according to these theories the conflict of laws, or private international law, is an international body of rules limiting the validity in space of the substantive laws of states. In this respect, very few—if any—contemporary jurists will contradict Ago and his adherents. However, these postulates about the nature of the conflict of laws have also a positive side: they form the basis on which the arguments for the characterization theory rest.[10] Unfortunately, the exact meaning of these well-sounding sentences is far from clear. Autonomy is usually regarded as a quality of a state and not of a system of rules. Why should the fact that a court belongs to an autonomous state compel the court to apply a certain method of interpreting conflict rules?[11]

With regard to the alleged universal validity of the legal system of the court in question, and the mere factual character of foreign laws, it is probably true to say that the courts of a certain country are usually considered bound to apply only the laws of that country (apart from such instances of complex legal systems as that of the United States) and that the courts apply foreign law only indirectly. It is however a very delicate matter to establish the difference between valid rules and rules which have a mere factual existence (seen from the point of view of a certain court) and it seems inadvisable to rest a theory of characterization on such a basis. Gihl explains that by validity he simply means the quality of belonging to the legal system.[12] We shall presently see how this distinction between valid and factual rules functions when incorporated in a characterization theory.

The characterization theory of Ago, Gihl, and Schmidt can be stated briefly as follows:

The objects of the conflict rules are usually described in legal terms as if they were legal relations. Nevertheless, it is logically necessary to conceive the

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[8] Schmidt, 122, 161, 168; Gihl, 325; Ago, 302: ". . . que les règles étrangères tant qu'elles restent exclusivement telles, ne peuvent constituer qu'un fait sans valeur juridique pour l'ordre juridique national."

[9] Schmidt, 122–123. Gihl, 275. Ago, 281.

[10] Schmidt, 84, 122, 161. Gihl, 275 f.

[11] That Danish conflict of laws refers to the substantive law of a non-autonomous state is exemplified by the case (1935) Ugeskrift for Retsvæsen 1143 (Schmidt, 210) where Illinois law regarding matrimonial property was applied.

[12] Gihl, 3.

object of the conflict rule as mere factual relations because the legal rules which alone could give these factual relations the character of legal relations (by attaching legal consequences to the facts) have not been "found" until the conflict rule has been applied (i.e., has referred the fact to adjudication in accordance with a foreign law).[13]

Characterization is the activity of subsuming a set of facts (which contains features foreign to the interior life of the country) under the correct conflict rule. Characterization is thus an activity which is preliminary in relation to the final adjudication. This preliminary characterization cannot be carried out in accordance with the *lex causae*,[14] because this law is not yet known. Furthermore, the *lex causae* is a foreign system of law, and therefore has only factual character from the point of view of the *lex fori*, which as mentioned is autonomous, original, and of universal validity.

The theory results in the following prescription concerning the procedure to be applied in cases involving foreign elements: Facts should be characterized in accordance with the terminology of the substantive rules of the *lex fori*. (This adjudication is preliminary, as its only purpose is to subsume the facts under the right conflict rule, and fictitious, as the "foreign features" are disregarded.) Then the conflict rule is applied, i.e. the judge is referred to that foreign law to which the decisive connecting factor points. Finally, the judge decides the case in accordance with the substantive rules of the foreign law. An important detail in Schmidt's theory is that the facts which are thus finally adjudicated in accordance with the foreign substantive law are exactly the same facts as were characterized in conformity with the *lex fori*. All the substantive rules of the *lex causae* which attach legal importance to such facts are applied. Thus, no secondary characterization is necessary.[15]

What is the objective of this theory? How can its validity be tested? A theory which without important changes has been maintained by an Italian, a Swede, and a Dane can hardly be meant as a description of how the judges of the respective countries have in fact dealt with the problem. Surely the thinking and argumentations of the judges of these three countries differ. The validity of the theory is apparently not confined to any particular national system of law. Schmidt in his book is more concerned with the cases which have been discussed in the international conflict of laws doctrine than with Danish cases. Only four Danish cases are mentioned—all seem to support the *lex fori* theory—but none is regarded as very important. It seems equally wrong to understand the theory as a method of interpretation which is recommendable because it leads to socially desirable results. No discussion of the policies involved in the different areas of the conflict of laws appears in the texts.

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[13] Schmidt, 131; Gihl, 363–64.

[14] Schmidt, 152 f.; Gihl, 360–61; Ago, 323–24.

[15] Schmidt, 149.

It is probably more correct to characterize the theory as concerned with legal (or linguistic?) logic. Unfortunately, the writers have not made explicit the epistemological basis of the theory.

"*La question des qualifications*" in the conflict of laws doctrine was originally a question whether or not it is possible to find a method of interpretation which will produce uniformity to the extent that the different legal systems contain the same conflict rules.[16] The Ago-Gihl-Schmidt theory is completely negative in this regard. The attempts to provide a method of characterization which could promote uniformity, the *lex causae* theories,[17] the comparative theories,[18] and the modified *lex fori* theories[19] are all rejected on logical grounds. To take into consideration the treatment of the case in accordance with the *lex causae* before having decided which conflict rule should be applied is logically impossible—so says the theory. Why? Usually a case is only connected with a limited number of countries and to find out how it would be treated if referred to the laws of these countries will not meet insuperable difficulties.[20] (It is hardly possible that any responsible judge would decide the choice of the applicable conflict rule without envisaging the consequences with regard to the final adjudication.) Of course, the decisive argument against the *lex causae* theories is not a practical one. If it were really impossible for the judge to take the *lex causae* into consideration during the characterization process, there would be nothing to discuss. The decisive argument against the idea of taking foreign law into consideration when interpreting the conflict rules is a theoretical one, namely that the foreign laws (the possible *lex causae*) from the forum's point of view are without legal character—mere facts—until these laws are incorporated (Schmidt: "transformed") into the *lex fori* as a result of the application of the conflict rule.

This line of thought is not convincing. Even if it had to be accepted that the forum must regard foreign law as "mere fact," this purely verbal assumption could not prevent the judges from taking those foreign laws into consideration with which the case has some connection or other. That which should

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[16] E.g., Bartin, "De l'impossibilité d'arriver à la suppression définitive des conflits de lois," 24 Journal du Droit International Privé (1897) 225–255.

[17] E.g., Despagnet, "Des conflits de lois relatifs à la qualification des rapports juridiques," 25 Journal du Droit International Privé (1898) 253 f.

Martin Wolff, Private International Law (Oxford, 1945) 146–167.

[18] E.g., Rabel, "Das Problem der Qualifikation," 5 Zeitschrift für ausländisches und internationales Privatrecht (1931) 241 f.

Beckett, "The question of classification (qualification) in private international law," 15 British Yearbook of International Law (1934) 46–81.

[19] E.g., Robertson, Characterization in the Conflict of Laws, (Cambridge, Massachusetts, 1940).

[20] Hjalmar Karlgren, in his critical reviews of Gihl's and Schmidt's writings advocates a similar view: (1951) Tidsskrift for Rettsvitenskap, 463; (1952) *id.* 492 f. (1954) Svensk Juristtidning, 497–504.

be characterized (subsumed under a conflict rule) is according to the theory a set of facts. It should not be incompatible with this statement to include the foreign substantive law with which the case is connected among those facts.

Furthermore, it may be questioned whether it is reasonable to maintain that foreign law is "fact," until the court is referred to such law by a conflict rule. It seems equally consistent to say that the "validity" of the foreign substantive law is coeval with the time when the conflict rule (which under certain circumstances will refer to that law) came into being.

The most characteristic feature of the theory is its "fact approach" to the questions of interpretation. Schmidt asserts that the object of the conflict rule is a certain set of facts, and he rejects the idea that the object could be conceived as "legal questions," "abstract legal relations," or legal rules. In cases where the conflict of laws prescribes that two or more different laws apply, e.g. the *lex loci actus* determining the validity of the contract as to form, the proper law of the contract governing the essential validity of the contract, and the personal law of the parties determining their capacity to contract, the judge should distinguish those facts which according to the *lex fori* have regard to form, those which concern essential validity, and those which concern capacity. The legal consequences of each of these three sets of facts should eventually be determined in accordance with the respective laws.[21]

It is an oversimplification to explain the judicial process as the activity of adding legal consequences to mere facts without legal character. Human behavior which is influenced by the knowledge of a certain legal system and by the wish to produce legal results cannot be understood and described in a meaningful way without considering the laws implied, and these laws are in conflict cases often foreign laws and not the *lex fori*. How could for instance a marriage ceremony be described without implicitly involving the laws that give meaning to the utterances of the parties and authority to the minister?

Insofar as the conflict rules use legal terminology in order to describe the cases to which they apply, it seems unreasonable to maintain that these expressions should be interpreted as referring to a fixed set of facts, namely that set of facts which the expression designates in the *lex fori*. Eminent investi-

[21] Schmidt, 194.

We see here the mechanical function of the theory at its worst. Imagine a married woman who accepts an offer of a sale by answering "yes." What facts should as "form facts" be governed by the *lex loci actus* and what facts should be governed by the "proper law"? The fact that the woman is married may be without any importance according to the *lex fori*, while this fact would invalidate the contract according to her personal law (or the "proper law"). Being of no importance according to the *lex fori*, that fact would not be found by the judge who selected the operative facts in the light of the *lex fori* in strict conformity with Schmidt's theory.

gators of legal language such as Alf Ross[22] and H. L. A. Hart[23] have independently of each other come to the conclusion that such terms as "right," "obligation," "corporation," etc. in the context in which they ordinarily appear cannot be substituted for by a set of operative facts or a set of legal consequences but that these terms must be understood as terminological instruments the function of which is determined by the legal rules.

These analytical results contain a warning against characterization theories which pretend to provide an easy solution to the interpretation problems in the conflict of laws. We cannot expect that the legal terminology belonging to the substantive law of the forum and determined by the contents of that law will be adequate for describing events influenced by foreign laws. It seems inevitable that the difficult task to provide harmony between the many systems of law and to provide a reasonable and fair treatment of legal relations created under a foreign law should necessitate careful studies of the laws involved and this applies not only to those who create the conflict rules but also to those who interpret these rules.

ERIK SIESBY*

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[22] Alf Ross, "Tû-Tû," Festskrift for Henry Ussing (Copenhagen, 1951) 468–84; "Status i rettighedsdiskussionen," (1953) Svensk Juristtidning, 529–40.

These articles are contributions to a discussion of the semantic analysis of legal terms. See Per Olof Ekelöf, "Juridisk slutledning och terminologi," (1945) Tidsskrift for Rettsvitenskap, 211 f.; "Till frågan om rättighedsbegreppet," (1947) *id.*, 481–514; "Om begagnadet av termen rättighet inom juridiken," Festskrift tillägnad Birger Ekeberg (1950) 151–77; "Ä termen rättighet ett syntaktisk hjälpmedel utan mening?" Skrifter tillägnad Vilhelm Lundstedt (1953) 546–59; Ivar Strahl, "Till frågan om rättighetsbegreppet," (1946) Tidsskrift for Rettsvitenskap. 204 f.; Anders Wedberg, "Logical Analysis of Legal Science" (in English, 1951) Theoria, 246–75.

[23] H. L. A. Hart, "Definition and Theory in Jurisprudence," 70 L. Q. Rev. (1954) 37 f. (reviewed by *Yntema* in the present journal (1954) 260).

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SINZHEIMER, H. *Jüdische Klassiker der Deutschen Rechtswissenschaft.* Frankfurter Wissenschaftliche Beiträge, Rechts- und Wirtschaftswissenschaftliche Reihe, Band 7. Frankfurt am Main: Vittorio Klostermann, 1953. Pp. 254.

On October 3rd and 4th, 1936, a conference was held in Berlin by the Reich Group of University Teachers of the National Socialist Lawyers' Guild on the topic "Jewry in Jurisprudence." The speakers were unanimous in describing the contribution of Jewish scholars to German law and jurisprudence as "peculiarly Jewish," meaning, "nonspiritual," destructive, conceived in the "disruptive philosophy of liberalism and individualism," and consisting in "a sham over-concrete, so-called objective observation." The conference, accordingly, issued a manifesto, banning the writings of Jewish legal scholars from German universities and German life. In answer to this manifesto, Hugo Sinzheimer, a prominent German expert on labor law, then in exile, wrote a series of biographical essays, which appeared in 1938 in Holland (in German) under the

title "Jewish Classics of German Jurisprudence." In it, the author purported to prove that, contrary to the allegations of the conference, the Jewish contribution to German law and jurisprudence was not "distinctively Jewish," disruptive, but rather consisted in a variety of opinions, rooted in and productive of German thought in its historical development. In 1953, the volume was reprinted in a series issued by the Law Faculty of the University of Frankfurt. The preface to this second printing was written by Franz Boehm.[1]

The tone of the book is dispassionate or—as a German would say—"scientific." Yet it is a book written with a tendency, and that tendency is disturbing. Unless the aim is to show that the Jewish background of certain writers, e.g., their knowledge of the Talmud, influenced their thought, so that their contribution is "distinctively Jewish"[2]—Sinzheimer attempts to demonstrate the very opposite—there is neither need nor, indeed, justification for books such as Five "Jewish" Lawyers of the Common Law[3] or "Jewish" Classics of German Jurisprudence. This for two reasons.

In the first place, no individual or group of individuals should be required to prove his or its claim to equal protection and to freedom of expression by showing that he or it is particularly excellent (or equally excellent with others),[4] representative of the community, or useful.[5] An attempt to adduce such proof tends to weaken rather than strengthen this essential postulate.

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[1] Franz Boehm was the representative of the Bonn Government in its conferences with Israel concerning reparations.

[2] For a brilliant study of the role played by Jewish law in the development of German law, see Guido Kisch, Sachsenspiegel and Bible (1941).

[3] Goodhart, Five Jewish Lawyers of the Common Law (1949). See Weitzner's review of this book in 13 Jewish Social Studies 263 (1951).

[4] Whether Negro, Indian, Asiatic, Catholic, or Jew, an individual should be judged solely on his merits as an individual to the extent that particular merits are pertinent to a particular issue.

[5] This is perhaps best expressed in a document reproduced in the book under review. Pp. 69–72. The document consists in a letter written by Levin Goldschmidt, the Lord Mansfield of the German Law Merchant, to the historian Heinrich von Treitschke on May 4, 1881, and appearing as annex to the biography of Goldschmidt. Treitschke, who had been a friend of Goldschmidt for many years, published a series of antisemitic statements, attributing to Jews numerous reprehensible qualities, but granting to Goldschmidt and several others the status of exceptions. Moreover, he invited Jewish scholars to prove their detachment by expressing agreement with him. After rejecting treatment as an "exception," Goldschmidt wrote:

"I feel perhaps more vividly than anyone else the damage done not to Jewry but to the Jewish population. While not a historian myself, I believe that the history scholar, who knows how to differentiate the essential from the accidental, who investigates the causes of a complicated process with impartiality and calm coupled with a knowledge of the subject-matter, must arrive at entirely different conclusions from those which you have reached.

"In my opinion, there are only two ways to reach these conclusions: either by finding the source of the evil in the inadequacy, nay, perhaps wrongfulness of the religious views of the Jews, hence by declaring them to be members of a bad religious community, beyond improvement—or by finding that source in the race, the original nationality.

"You seem to assume essentially the second position; but you admit a more or less large group of exceptions. As against that, I emphatically declare it utterly inadmissible that each

Secondly, books should not be banned or burnt under any circumstances, whether on the ground that they are bad or on the ground that their authors are wicked. Ideas expressed in books should be vanquished by other books, not by burnings.[6] For nowhere has Georg Jellinek's statement, "Causality is the justice of world history,"[7] proved more true than in the realm of books. The history of culture shows that the judgment on the virtue or vice of a book often changes in the course of time. That history also demonstrates that many a book adjudged "good" was written by a man adjudged "wicked."[8] An attempt to save a book from burning by showing that it is a good book written by a good man does violence to the stated fundamental principle.

As against the position taken in this review, the argument might be advanced that while there was perhaps no need in the United States or in England for Goodhart's demonstration that the Jewish contribution was an asset to the common law,[9] the Nazis' express challenge of the Jewish contribution to German legal science did call for a refutation. I believe that it did not. On a scientific level, the National Socialist declaration raised no issue.[10] Nazi "science" was patently absurd. Refuting it was raising it to the level of a proposition which, though it might be shown to be erroneous, posed a scientific problem.

In this context, it might be interesting to note a view expressed by Franz Boehm in the preface to the second printing of the book under review.[11] Boehm feels that the spirit of inhumanity and brutality, prevailing in the Nazi era, as that of any inhumanity and brutality, is an outgrowth of a primitive human urge which is independent of any scientific or political rationale. It can associate itself with one doctrine as well as with another. For that reason, it is idle to fight it by demonstrating the falsity of its doctrinal or factual basis.[12]

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member of a race or religious community, which is in itself bad, should have to prove that he is an exceptionally decent human being. I find in this assumption the heaviest assault upon the legal and social equality of citizens—, worse, because the accusations you raise essentially belong to the sphere of ethics."

[6] Luther's pronouncement is particularly apposite: "But heretics should be vanquished with books, not with burnings." Bainton, Here I Stand, a Life of Martin Luther (1950), p. 154.

[7] Cited in Sinzheimer, Jüdische Klassiker, p. 181.

[8] Perhaps, had Plato lived in our times, he might have been indicted of crime against nature. Yet many of our moral judgments may be traced back to him. Rousseau's own "Confessions" do not make him appear a model of a virtuous man. Yet the roots of many of our political and educational views may be found in his writings. Freud has shown that there is, indeed, an affinity between genius and neurosis, which is sometimes expressed in behavior of which society disapproves. See, Eine Kindheitserinnerung des Leonardo Da Vinci, 3rd rev. ed., 1923.

[9] Cited *supra*, note 3.

[10] In fact, most of its statements were self-contradictory. The Nazis accused the Jews of both hair-splitting conceptualism and over-concreteness, both of communism and capitalism.

[11] *Op. cit.*, pp. xi, xii.

[12] Of course, abroad where the work of German scholars was not well known, there may have been reason for counteracting the elaborate antisemitic propaganda of the Nazi regime by demonstrating wherein the contribution of Jewish scholars actually consisted. From this

However, as a study of the "Jewish" Classics of German Jurisprudence, Sinzheimer's book is justified by one redeeming feature. This feature is summarized in two words printed between the title page and the table of contents: "*In Memoriam.*" The book was dedicated to the memory of twelve legal scholars at a time when their memory was being slandered. It was reprinted in this spirit, "*in memoriam.*"

The twelve scholars whose memory is thus being honored are: Friedrich Julius Stahl, Levin Goldschmidt, Heinrich Dernburg, Josef Unger, Otto Lenel, Wilhelm Eduard Wilda, Julius Glaser, Paul Laband, Georg Jellinek, Eugen Ehrlich, Philipp Lotmar, and Eduard von Simson. The author's references to their Jewish background as well as his attempts at showing that they were not "distinctively Jewish" could be easily eliminated without detracting from the relevancy of the book as a study in the history of legal culture. Is there anything other than their Jewish background that unites them, so as to justify inclusion of their contributions in one volume?

They were "men of the 19th century," meaning that they not only lived during that century but also spiritually belonged to it.[15] They are actually "representative," in that their work affords a cross-section of the political, jurisprudential and legal opinion of the era.

Politically, it was an era in which the verbal symbols of the French Revolution had passed the stage of ethical-philosophical rationalization (Kant) and developed from fighting slogans to fixed assets of the legal and institutional-political vocabulary. It was also an era of awakened constitutionalism and rising nationalism. The stirring of the "masses" began. New ideas were shaping in the field of human liberty; the notion of social and economic protection of the individual, as an incident of individual right, evolved, proving how little Marx knew about the inventiveness of the human mind.

Jurisprudentially, reaction to Savigny's historical school was passing from adoration to skepticism. The contest of the Romanists and the Germanists[14] was active. Hegel's sham "world of reality" began crumbling, and Jhering declared his war on conceptualism. "Sociology" was growing increasingly meaningful.

In law itself, the 19th century was the period of the great codifications in Europe. But while new drafting techniques were developed, doubts arose concerning the omnipotence of statutes. The judicial function gained in significance. New fields of law—notably labor law—were emerging, in which the traditional distinction of statute and contract appeared to be waning.

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point of view, Sinzheimer's book might have been useful had it been written in languages accessible to people other than German-speaking. For purposes of an effective counter-propaganda, moreover, it would have been preferable had Sinzheimer not attempted to refute many of the Nazi allegations which were, in fact, laudatory, although not meant to be such.

[13] Of course, several of these men, Ehrlich particularly, also belong to the 20th century.

[14] "Romanists" are called the students, and sometimes, the adherents, of Roman law, "Germanists" those of the native German law.

In this world of motion and variety, the group of twelve men to whom Sinzheimer's volume is dedicated does not represent a distinctive wing. At best, a common emphasis may be discovered. While none of these men believed in a completely self-sufficient individual, an individualistic component, varying in shade and degree, is present in the writings of each of them. Many of them, including Ehrlich, celebrated legal sociologist or sociological jurist,[15] were Romanists.[16] Nevertheless, they do not figure in the "Heaven of Jurisprudential Concepts"—Jhering's famed satire on conceptualism[17]—in which Romanists occupy a paramount position.[18] In fact, to those who were Romanists, the Roman law served not as an exercise in legal dialectics but as the very means for the discovery of the significance of legal reality. Of course, "reality" is a term of many meanings. Stahl first pointed out the logical errors of Hegel's logic and the absurdity of his concept of "reality," the reality discoverable by a purely logical process.[19] But the "institutional" reality he substituted therefor was quite different from the social reality of Eugen Ehrlich, more different perhaps than the latter is from the reality of American legal realism. Yet there is in the writings of the twelve scholars a distinct movement toward increasing concreteness and diversity of "reality."

When we turn from the equivocal notion of "reality" to the somewhat less equivocal notion of "practical thinking," we may find that, in varying degrees, all these men approached the law from the point of view of its application. Many were active in the political life and in the legislative work of their countries.[20] They were instrumental in developing constitutional ideas (Stahl, Laband, Jellinek) as well as in shaping the reform of the civil (Dernburg,

[15] Ehrlich has won much more acclaim in the United States than in Germany. Sinzheimer remarks (*op. cit.*, p. 206): "There was silence when Eugen Ehrlich passed away. No memorial addresses were delivered; until the present time, many German legal scholars do not know him even by name." This may be explained by the general distrust of sociology prevailing in Germany rather than, as Patterson states (see his article, "Ehrlich, Eugen," in Encyclopaedia of the Social Sciences), by Ehrlich's "unreliability" as a scholar.

[16] Romanists were frequently accused of conceptualism.

[17] See Jhering, Scherz und Ernst in der Jurisprudenz, 9th ed., 1904, pp. 245 *et seq.* Sinzheimer (*op. cit.*, p. 241) notes that but for one exception the "Heaven of Jurisprudential Concepts" was populated by "aryan" spirits, contrary to the Nazi claim that Jewish scholars engage in hair-splitting.

[18] Both Jhering and Ehrlich, perhaps the most realistic of European legal scholars, devoted a major part of their lives to the study and analysis of Roman law. This fact sheds an interesting light on the meaning and function of Roman law in European jurisprudence. It shows that in Europe Roman law is not a dead letter but an integral part of legal reality. It is, therefore, regrettable that in our study of comparative law we neglect this significant spiritual source of European legal thought.

[19] On Stahl's critique of Hegel, see Sinzheimer, *op. cit.*, pp. 17 *et seq.* Thisritique is in many respects similar—in essence, not in tone—to that later applied by Bertrand Russell. See Russell, Unpopular Essays (1950), pp. 10 *et seq.* Sinzheimer points out that in successfully criticizing Hegel, Stahl indirectly shattered the ideological basis of the doctrine of Karl Marx.

[20] Not all were active in Germany. Unger and Glaser taught in Austria, Ehrlich in what before the first World War was Austria. Lotmar taught in Switzerland.

Unger, Lenel), commercial (Goldschmidt), and labor (Lotmar) law, as well as of criminal procedure (Glaser). It is a credit to them that in their work they did not limit themselves to the confines of a narrow-minded nationalism, but drew upon experiences of other nations, among them England and America (Goldschmidt, Glaser, Jellinek).[21] For so doing, they were labelled as "Jewish internationalists." But no Nazi abuse and, indeed, nothing can eradicate their memory from the history of legal culture, for they contributed to its making. Nor can books be burnt. Like the Phoenix, they rise from their ashes.

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[21] Note particularly Glaser's work on the jury system and Jellinek's work on civil liberties.

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KONVITZ, M. R. *Bill of Rights Reader*. Cornell University Press, 1954. Pp. xix, 591.

Professor Konvitz, a member of the faculty of New York State School of Industrial and Labor Relations at Cornell University, states in his preface that this book of leading constitutional cases has been prepared as "a contribution to the education of that mythical character, the average, educated American who is interested in the great issues and the great debates of his day." His preface indicates also his own earnest devotion to constitutional liberties and his apprehension that these liberties may currently be suffering from a process of erosion. His principal concern, however, is not to state a thesis but to make a contribution to the knowledge and understanding of interested, intelligent citizens.

The book is substantial and meaty. About seventy-five cases are included. This is not simply a collection of excerpts and quotations from opinions. The author lets the cases speak for themselves. He has of course edited them, has omitted some parts of opinions, and, in order to aid the reader's understanding, has supplied useful introductory notes designed to simplify the factual background of the case, explain why the case was chosen and supply background material by way of reference to preceding or related cases. But in editing he has not sacrificed space at the expense of ideas and arguments. Dissenting and concurring opinions are included in many instances. The *Dennis* case, dealing with the conviction of the eleven Communists under the Smith Act and of key importance to the "clear and present danger" concept, occupies thirty-seven pages. The range of the subject necessarily leads to some bulk in terms of pages, and the nature of judicial opinions dealing with problems in this area precludes capsule or boullion cube treatment. This is not a reader's digest of judicial opinions.

Starting with the "The Rule of Law," exemplified in part by opinions from the important steel seizure case, the book continues with opinions in cases dealing with freedom of religion, freedom of assembly and petition, freedom of speech and press, personal security, freedom from race discrimination, and

freedom of labor. The freedom of speech and press materials are broken down in separate chapters dealing with basic principles, the clear and present danger doctrine, the problem of loyalty, censorship, and contempt by publication.

The choice of cases is on the whole admirable. Indeed, they are for the most part cases that would be included in a Constitutional Law casebook for law student use. Opinions will naturally differ on some details of inclusion and exclusion. But taken in their entirety, the opinions collected in this book do adequately reflect the range and meaning of our constitutional liberties.

A study of the book's contents will reward the reader not only by imparting a solid knowledge of basic ideas and concepts that give meaning to our notions of constitutional liberty but also by provoking and stimulating critical thinking on current issues of vital importance. This volume should also prove to have a particular value for the foreign reader, both lawyer and layman. Here is a handy volume that will readily introduce him to our body of constitutional rights, and give him an adequate basis for understanding and evaluating the American conception of constitutional freedom.

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Book Notices

RECENT GERMAN LITERATURE CONCERNING COPYRIGHT

Doubtless because of the forthcoming thorough revision of the German Copyright Act and the expected ratification by Germany of the Universal Copyright Convention, there has been a great deal of study on the part of German copyright experts in recent months which is reflected in a series of important publications, both monographs and periodicals.

PERIODICALS

Ufita (Archiv für Urheber- Film- Funk- und Theaterrecht). Editor, Dr. Georg Roeber. Baden-Baden: Verlag für Angewandte Wissenschaften. Vol. 18 (1954).

Musik und Dichtung. Editor, Hans Eberhard Friedrich. Berlin (W 35): "Musik und Dichtung" Christian Wilk. No. 2 (1954).

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SCHULZE, E. *Rechtsprechung zum Urheberrecht.* München und Berlin: C. H. Beck'sche Verlagsbuchhandlung, 1954. Looseleaf, appr. Pp. 300.

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SCHRAMM, C. *Grundlagenforschung auf dem Gebiete des gewerblichen Rechtsschutzes und Urheberrechtes.* Berlin und Köln: Carl Heymanns Verlag, 1954. Pp. xxiv, 431.

I. *Periodicals*

In the periodical field, attention should be called to two publications which are of considerable importance not only to students of German domestic copyright but to those interested in international copyright as well. "*Ufita*" (Archiv für Urheber-Film- Funk- und Theaterrecht) is, of course, not a new publication but it had been discontinued for many years since the beginning of World War II. A year ago its publication was resumed and the latest issue, published as of November 1954, includes a series of valuable monographs on current copyright problems, such as, for instance, the rights of performing artists, of manufacturers of phonograph records, copyright problems relating to television, and many others. There can be little doubt that this excellent publication will soon regain its place as one of the most authoritative publications in the field of copyright.

Of somewhat different type is the new publication entitled *Musik und Dichtung* (Organ für die Rechte der Urheber in Aller Welt; Zeitschrift für das Geistige Eigentum). Two issues of *Musik und Dichtung* have appeared thus far. This publication does not pretend to present an entirely objective point of view of copyright problems generally but is specifically devoted to the rights and interests of authors, and more particularly to those of musical works. While primarily discussing problems

of musical copyright from the point of view of German law and the proposed reform thereof, the periodical also includes a review of foreign literature and its developments in other countries.

Of special interest to students of the comparative aspects of copyright (as well as the law of patents, trademarks and unfair competition) is the new section in *Gewerblicher Rechtsschutz und Urheberrecht* entitled *Auslands-und Internationaler Teil*. While this *Auslands- und Internationaler Teil* has already appeared for the last few years, there has recently been added a new section attempting to give a complete bibliography of recent literature and judicial and legislative developments in all major countries of the world. This will undoubtedly be a significant contribution to the study of comparative law.

II. *Books*

Das Recht der Verwertungsgesellschaften is apparently the first comparative study of the laws of various countries dealing with musical performing right societies. The present book consists of three parts, an introduction by Professor Eugen Ulmer; a thorough comparative study of the constitution of performing right societies and their relationships to government and their members by Professor Kurt Bussmann; and a third part, giving a detailed summary of the law of each country with regard thereto, by Sibylle Weber. A fourth part, containing the text of all pertinent laws, is not included in the printed publication but is available for examination at the Institute of Foreign and International Patent, Trade-Mark and Copyright Law at the University of Munich. The present publication was sponsored by the Association for Comparative Law of the University of Tübingen. No similar study has been published in the past, and this book should prove of invaluable assistance to those interested in performing right societies and their place in the overall problem of granting copyright protection to musical works.

Erich Schulze's *Musik und Recht* is a study by the president of the German Performing Rights Society with regard to the problem of performing rights. It considers not only the proposed new German law but the various international conventions as well.

While *Musik und Recht* was written by Erich Schulze before the proposed new German copyright bill was available, *Recht und Unrecht* is devoted entirely to a critical analysis of the most recent German legislative proposal. The bulk of the book consists of tables comparing the most recent legislative draft with all previous suggestions for copyright reform and includes also legislative proposals by the author himself.

Rechtsprechung zum Urheberrecht, by the same author, is an up-to-date collection of German decisions by both the appellate and lower courts on all phases of copyright. This work, which is looseleaf bound to permit additions from time to time, also includes notes and comments following each reported case, and a collection of important foreign decisions including rulings by the courts of Belgium, Holland, Austria, and Switzerland.

Available from the West German Department of Justice, *Referentenentwürfe zur Urheberrechtsreform* contains the proposed new German copyright law with a comprehensive commentary and explanations comparing the proposals with the law presently prevailing in other countries. There is a particularly interesting discussion of such concepts as, for instance, the *droit moral*, *droit de suite*, the so-called "*Kulturabgabe*" (*domaine public payant*), and numerous other concepts which are as yet unknown in our own law.

The recently published study,

Grundlagenforschung auf dem Gebiete des Gewerblichen Rechtsschutzes und Urheberrechtes is devoted to a thorough, systematic examination of the foundation of the law dealing with patents, trade-marks, designs, copyright, and unfair competition and to developing certain overall principles of law which are common to all these branches of the law. In the course of the study, the author pays particular attention to a discussion of the so-called "*droits voisins*" and these problems under German law are referred to as "*Leistungsschutz*." There is an interesting discussion of the problem of slavish imitation of unprotected works and ideas, as well as a thorough discussion of the territorial scope of industrial property rights. The type of problem recently decided by our Supreme Court in the case of Steel v. Bulova Watch Co., 344 U.S. 280 (1952), is examined from the point of view of conflict of laws as well as from the viewpoint of special considerations which may apply to trade-marks, copyright, and other industrial property rights. W. J. D.

Congreso Internacional de Juristas Reunido en Lima del 8 el 18 de Diciembre de 1951. Discursos Ponencias Resoluciones. Lima: Editorial San Marcos, 1953. Pp. 799.

A distinguished group of jurists met in Lima at the invitation of the University of San Marcos on the occasion of its 400th anniversary. European visitors included Mazeaud and Rousseau from France and Carnelutti and Ascarelli from Italy. The chronicle of the conference, the speeches and papers presented, and the resolutions adopted are published in this volume, in Spanish or Portuguese. The topics for discussion included Legal Education, Civil, Criminal, International, Constitutional, Administrative, Commercial, Rural, Mining, Labor Law, Procedure, and Legal History and Philosophy. The Civil Law sessions were devoted mainly to Unification, the Criminal Law to new techniques and their relation to human rights. The American contributions in the volume are by George Maurice Morris on the proposal for an International Penal Code, and Edwin Letts on Regional Systems under the United Nations. There is only one paper on Private International Law, by Eduardo Espinola of Brazil (on foreign divorce decrees), and less attention was paid in general to comparative law than one might have expected.

PHANOR J. EDER

Verhandlungen des vierzigsten Deutschen Juristentages, Hamburg 1953. Herausgegeben von der Ständigen Deputation des Deutschen Juristentages. Band I (Gutachten). Tübingen: J. C. B. Mohr (Paul Siebeck), 1953. Pp. 236.

The present volume contains four reports by leading German authors, which formed the basis for discussions at the 40th Convention of German Lawyers (*Deutscher Juristentag*) in 1953. The conclusions of these reports aim at changing or maintaining some features of German law presently considered as controversial. Thus, Duden advocates facilitating the inclusion of antidevaluation clauses in contracts. Such clauses are practically excluded under present German law. Heinitz holds it inadvisable to change German law so as to introduce penal responsibility of corporations. He draws his arguments from legal history as well as from legal philosophy. While he is in favor of present German practice, allowing financial sanctions against corporations that violate minor rules of orderly conduct (especially under legislation in the economic field) he rejects the notion of criminal liability of corporations and other juristic persons. Ridder attacks a current trend of German legal thought, aiming at "unfettering the third (i.e. the judicial) power" from the tutelage in which it is allegedly held by the executive power. The partisans of this reform would deny the executive any

influence on the nomination and promotion of judges and other court personnel as well as on any administrative problems connected with the working of administrative tribunals and law courts. Ridder adduces many arguments drawn from history and legal philosophy to show that this slogan would result in chaos, if it were applied to the last consequence, which however, does not appear to be the intention of all the proposed reform measures. Ridder considers the present status more satisfactory than the one envisaged by these proposals. Nomination of judges by the executive may lead to a slight amount of political patronage, but the remedy proposed, to wit, to entrust the nomination and promotion of judges to their colleagues would merely replace this patronage by an outright nepotism, with worse results in the long run. Kegel discusses the influence of unforeseen events on contracts. After having given a very interesting summary of the history of the *clausula rebus sic stantibus*, of the German doctrinal opinions on frustration, and on the equitable remedies granted to debtors on account of unforeseen circumstances, he examines the present status of German law on this subject, which, to a certain extent at least, is judge-made. This is the reason why Kegel includes in his report more than a dozen pages of very illustrative quotations from German leading cases decided since 1948. Kegel adheres to the principles contained in these decisions, which not only consider frustration as sufficient reason to free a party from the clauses of a contract but also seek to substitute for such contract clauses solutions considered more equitable under the changed circumstances. In general, such solutions result in dividing the loss caused by the unforeseen event equally between the debtor and the creditor.

A common feature of all four reports is their comparative approach to their subjects. They refer frequently to United States, British, and French law, and to the experience in these countries. The reports thus are a very valuable contribution to comparative research.

I. SEIDL-HOHENVELDERN

DUHAMEL, J.—DILL SMITH J. *De Quelques Pilliers des Institutions Britanniques*. Paris: Recueil Sirey, 1953. Pp. 331.

The present highly interesting study aims to explain certain basic principles of English law to the French public. Except for two chapters concerning the organization and hierarchy of courts and of the legal profession in the United Kingdom, the book is devoted to such aspects of British law as, in one way or another, concern the protection of civil rights. Thus, the authors examine the British law on criminal investigation and personal liberty (habeas corpus), contempt of court, freedom of the press, the taking of evidence, and legal assistance. While not being strictly a study in comparative law, all these institutions are viewed through French eyes and explained in notions familiar to French lawyers. As French law concerning these subjects is more or less similar to the laws of other European countries, the usefulness of the book is not limited to France. In my opinion, the authors have been very successful in their task.

As is natural, when dealing with a legal system based to such an extent on legal precedents as British law, the authors very often give summaries of leading cases. These summaries are not only indispensable to obtain a complete picture of the practical implications of the laws concerned; they offer highly instructive and valuable illustrations of the views presented by the authors and thus help to render the book understandable even to laymen. The value of the book lies not only in the fact that it is a skillful representation of British law in the fields concerned; it encourages

not only comparisons, but also the adoption, if not of the rules themselves, at least of the spirit of *practical* respect for civil rights so characteristic of British law. This spirit is sometimes lacking on the Continent, even if the protection of these rights is —in theory—equal if not superior to what it is in the United Kingdom. If I may add a few observations to improve a second edition of this useful book, I would suggest the elimination of the biographical footnotes concerning more or less famous British judges. On the other hand, the chapters on British courts and on the British legal profession could well be supplemented by some pages explaining the British system of law reports, which baffles foreign students, at least on their first contact with what to them are mysterious abbreviations. Moreover, if the authors at p. 100 are to make fun of a wrong translation of the words, "habeas corpus," it would seem advisable to give the correct translation as such and not only by implication, as is done on p. 103.

I. SEIDL-HOHENVELDERN

PIOVANI, P. *Il Significato del Principio di Effettività*. Pubblicazioni dell'Instituto de Filosofía del Diritto dell'Università di Roma, XXVI. Millano: A Giuffrè, Editore, 1953. Pp. 206.

This study is devoted to the problem of effectivity in international law, i.e., to the phenomenon that legal rights may be acquired by acts which originally were illegal; thus, a new state may become a member of the international community after having severed itself from another state by a successful revolution. After a short survey of pertinent state practice on recognition of new governments and of court decisions concerning the situation of nonrecognized governments in the courts and the legal importance, if any, which is to be given to their acts, the author devotes himself entirely to the problems of legal philosophy raised by these facts. The book thus contains a very interesting analysis of the notion of the state and of legitimate government, a critique of some aspects of Kelson's pure theory of law, and the author's views on the relations between facts and law and the legal significance of the recognition of new states and governments. Unfortunately, reasons of space preclude further exposition of the views set forth in the present work and any appraisal thereof from the point of view of legal philosophy—however interesting this would be.

I. SEIDL-HOHENVELDERN

RAUSCHENBACH, G. *Der Nürnberger Prozess gegen die Organisationen*. Bonn: Ludwig Röhrscheid Verlag, 1954. Pp. 153.

The subtitle of this work which is presented by the author, a Cologne attorney, as the 13th volume of the well-known series *Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft*, defines the scope of this study of the criminal responsibility of organizations, as including: Fundamentals, Problems, Effects upon Firm Members, and Results in the Field of Criminal Law.

Complementing H. H. Jescheck's study of the responsibility of public agencies,[1] which deals exclusively with individuals, his monograph starts with the Roman principle *Societas delinquere non potest*, followed in the medieval German law by recognition of community guilt, involving the responsibility of the whole clan for each member, as exemplified by the original *Sippenhaftung* (which had a dangerous revival under Hitler) and the imperial ban decreed against a disobedient city or fortress which sheltered some outlaw. Only with the eventual triumph of the Roman law in the era of the Renaissance and with the ascent of

[1] Jescheck, H.H. *Die Verantwortlichkeit der Staatsorgane nach Völkerrecht*. Bonn: Röhrscheid, 1952.

Savigny's teachings, was the *societas* again regarded as a mere *personne morale* without conscience or will, a most carefully separated capital. Gierke modified this theory, and the historical developments of the late 19th and early 20th century, partially due to the changes in the structure of the political parties, gave rise to criminal actions for group offenses, the immediate perpetrators of which are far less guilty than the highranking members of the organizations in the background.

While the author is to be congratulated on his very thorough and exhaustive study, more stress might have been given to the main purpose of the trials against the organizations, namely, establishment of their guilt with reversal of the burden of evidence in prosecutions of their members. Although it is mentioned (p. 48) that an automatic judgment against the members of such organizations is not intended as a consequence of a sentence against the organization itself, it should not appear too strange to a continental lawyer that, unless the member can prove that he had no knowledge of the manipulations of the firm and the guilty principals, he should be regarded at least as an accessory.

ROBERT RIE

VON HENTIG, H. *Zur Psychologie der Einzeldelikte.* Vol. I. Tübingen: J.C.B. Mohr (Paul Siebeck), 1954. Pp. viii, 195.

The author of this interestingly written book, a professor at Bonn University and one of the best known German criminalists, feels that criminalistic research has neglected the study of specific crimes. Therefore, he has selected for study three crimes: theft, burglary, and robbery. He describes each separately, not as legal concepts and with little stress on their dogmatic definition, but as interesting types of human behavior. Free from any kind of value judgment, he seems to display the same kind of professional sympathy for the subject matter as would a natural scientist in describing some types of insects or snakes.

He relies on an ample stock of statistical data (which he uses with rare circumspection) and a rich literature on criminals, including, particularly, works by criminals on their own criminal ventures. He quotes at least as many English and American as German authors and frequently refers to conditions in America.

By way of illustration, the following observations are of interest: on the deep aversion against actual violence found among American robbers; on the interconnection between burglary and prison breach (they both presuppose the same technical skill); on the connection between robbery and rape (sometimes robbery is planned, but rape committed); also, on the abilities that a leader in an American bank holdup should possess, and many more. Students and professors of criminal law will equally enjoy the opportunity to have some life and color added to what otherwise might remain mere analytical definitions.

ROBERT F. WEISSENSTEIN

SCHWARZ-LIEBERMANN V. WAHLENDORF, H. A. *Mehrheitsentscheid und Stimmenwägung.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1953. Pp. 286.

With the modern trend against the principle of unanimity for decision-making in a number of supranational groupings, the apportionment and weighing of votes has become one of the major problems of international law-making. The present volume is a detailed study of this problem.

Having traced the beginnings of the majority principle and the weighing of votes in assemblies and electoral bodies in the Middle Ages and in early federal legislatures, the author turns his attention to the international plane. He reviews briefly voting practices in international conferences, arbitral and judicial organs, and

various international administrative bodies. He gives a short analysis of the voting system in the League of Nations. But his main interest is focused on the voting arrangements in the several organs of the United Nations and in the various contemporary regional bodies, such as the Organization of the American States, the Council of Europe, the Arab League, and the European Coal and Steel Community.

The main value of the study lies in the fact that the author has collected and well organized in one volume a wealth of pertinent materials. Its main deficiency is, on the other hand, top-heavy style. His persistent habit of interposing overlong bracketed passages into his sentences, already quite long-drawn out, makes reading at times rather difficult.

EDWARD TABORSKY

NUSSBAUM, A. A. *Concise History of the Law of Nations*. Revised Edition. New York: The Macmillan Company, 1954. Pp. xiii, 376.

This admirable work by a distinguished author aims at giving a general survey of the history of international law. Most of the book is devoted to short lucid *exposés* of the doctrines of the leading authors in this field as well as of their biographies. Facts of general and diplomatic history are mentioned insofar as they have a bearing on the development of international law. Some of these facts constitute striking parallels to problems of our times, e.g., the efforts of the Second Lateran Council (1193) to ban the use of the crossbow and arch as an unconventional weapon or the papal efforts to enforce a sort of Battle Act against the Saracens. Apart from the history of such concepts of international law as *bellum justum*, which were mainly developed by scientific speculation, the author also deals with the history of such concepts and institutions as neutrality and the rights of consuls, which are mainly the result of state practice. The book covers not only the history of international law in the West, but deals also with Byzantine, Moslem, and Soviet notions of international law. Ample bibliographical references facilitate more detailed researches. The book is written in an easily readable and lively style, even where the author explains philosophical notions, certainly a singular achievement. This is, however, in parts due to the fact, that the author very clearly stresses his personal views even on controversial subjects. Thus, the present reviewer would hardly subscribe to all the views set forth by Professor Nussbaum. Being an Austrian, he cannot but disagree with the author, when he seems to put at least most of the blame of starting World War I on Austria. Nussbaum's judgment on the achievements of the Institut de Droit International seems likewise too harsh, and in his defence of Grotius he seems to be carried away by the vehemence of his counter-attack on James Brown Scott.

In respect to the printing arrangement of the book, this reviewer would have greatly preferred to see the footnotes at the bottom of each page instead of having them printed at the end of the book. To read the book practically at two points at a time is tedious and irritating.

These remarks are however in no way intended to belittle the great value of this work. The fact, that, within seven years, the first edition was exhausted, thus rendering necessary the present second enlarged edition is in itself proof of its well-merited success.

I. SEIDL-HOHENVELDERN

WILSON, R. R. *The International Law Standard in Treaties of the United States*. Cambridge: Harvard University Press, 1953, Pp x, 321.

The author of the present book has examined all treaties concluded by the United States, which define the

scope of certain international rights and duties by reference to the standards prevailing in international law, instead of including specific provisions on the subject-matter concerned. These investigations are highly illustrative of diplomatic practice. Even more important, however, are the researches of the author as to what action, if any, was taken on the strength of such "reference" clauses. They give a clear picture of the notions of international law prevailing at the time, at least between the partners to the treaty. The author reviews treaty clauses concerning submission to international arbitration, exhaustion of local remedies, establishment provisions, the minimum standard for the treatment of aliens in respect to expropriations, navigation of international rivers, freedom of the seas, control of the slave trade, intervention, territorial waters, submarine warfare and neutrality. A summary review of the practice of other states in respect to treaty references to standards of international law is contained in an appendix. The author examines how far such references in treaties are intended to be declaratory of existing international law, thus merely reaffirming it and how far they are intended in reality to propose new rules for general acceptance by assuming that these rules are part of international law. This reviewer, shares the author's opinion, that there still exists a minimum standard of protection due to foreigners irrespective of whether the state concerned grants the same rights to its own citizens or not. However, the author rightly warns drafters of future treaties, that at the present time reference to this minimum standard may not be sufficient to grant foreigners full compensation. In a concluding chapter, the author declares himself generally in favor of including in treaties explicit clauses containing the material provisions of international law, to which the parties intend to refer, rather than mere reference clauses. Should the latter course be adopted, however, such treaties should contain at least an obligatory arbitration clause.

I. SEIDL-HOHENVELDERN

ANGELOPOULOS, A. *Planisme et Progrès Social*. Paris: Librairie Générale de Droit et de Jurisprudence, 1953. Pp. 403.

"The theses explained in this work belong to a 'theory' which has not yet found its definitive form and is not accepted as the 'dominant doctrine' of our era." The 'theory' to which the author thus refers, and which he seeks ardently to promote, is what he himself labels "the new economic and social policy of the welfare state."

Availing himself of the several (and by no means novel) arguments customarily advanced in favor of the "welfare state," Mr. Angelopoulos comes to the obvious conclusion that the new economic and social objectives of the state can be achieved only through full scale economic planning. Such planning can be successful, in the author's opinion, only if based on large scale nationalization of "*grands moyens de production*" (such as banks, mines, transportation, energy, heavy industry), while medium-sized enterprises, "*entreprises moyennes*," must also be under complete governmental control and be eventually nationalized when they become "ripe" therefor. (He believes that in any case the advent of the Atom Age itself will lead to the downfall of capitalism.)

In pursuance of this general line of thought, the author then proceeds to consider the various facets of this type of planned economy, such as the measures for the maintenance of full employment, productivity, investments, social security, public spending, fiscal and monetary policies, and the like.

As can be seen, Mr. Angelopoulos's book is a fervent (and well-written) advocacy of a radical socialist system,

which would seem too radical even to most of the present democratic Socialist leaders of Western Europe.

While the author's main concern is economic planning, he touches also on international politics and lays before the readers several snap judgments which reveal a great deal of wishful thinking and political *naïveté*. The most striking example thereof is his belief that adoption of welfare state policies on the part of the "capitalist countries" would incite the Communist countries "to enter the path of a close and sincere collaboration which would result in a *rapprochement* of the two systems;" and that the "Communist countries, no longer fearful of capitalist encirclement, would be brought to a gradual reform of their governmental system, which would ultimately lead to the democratization of Communism."

EDWARD TABORSKY

FAIREN GUILLEN, V. *El Proceso en la Ley de Sociedades Anónimas (Estudios sobre los articulos 67 a 70)* Barcelona: Editorial Bosch, 1953. Pp. 204.

The protection of minority shareholders is a theme of worldwide interest. Article 67 of the Spanish Stock Company Law of 1951 (this Journal, Vol. I (1952) 117) provides for a court test of the validity of corporate resolutions that are in violation of law or the articles of association or by-laws or that are injurious to the corporation for the benefit of one or more shareholders. The Code (Law) of Civil Procedure of Spain is notoriously complex, technical and dilatory. The draftsmen of the Corporation Law realized that recourse to the procedure of that code would be ineffective to afford adequate relief to shareholders or other interested parties. They therefore incorporated in the new statute a special summary proceeding in a lengthy article, with 12 sub-paragraphs (article 70).

It is the procedure therein outlined that is the subject of this exhaustive commentary by Dr. Fairen, of the Valencia Bar and professor of Procedure at the University in that city. Although thoroughly conscious of the defects of the Code—he has been one of its foremost critics—he finds little to praise and much to attack in the procedure laid down by the Corporation Law, which he examines in the light of the Code and of the doctrines of Italian and German writers. The author has perhaps been unduly influenced by the latter (some of whose works he has translated into Spanish) to the detriment of his own style and clarity. The book is difficult reading and while it is of some interest, especially on the topics of joinder of parties and of appeals, it cannot be recommended to any but a specialist in procedure. It might have been of value, but is not, to a corporation lawyer. Of the merits of the polemic thus inaugurated between the procesalists and the mercantilists of Spain, an outsider cannot judge, but several of the author's criticisms seem unrealistic and far-fetched; others may have a deleterious effect in leading the Spanish courts to adopt a harsh attitude towards this remedial legislation. He comments not at all on the substance of the law. One provision is reminiscent of the New York statute which has come in for so much criticism. In order to obtain a temporary injunction suspending a corporate resolution, the motion must be made by stockholders representing at least 20% of the stock (art. 70, subd. 4).

PHANOR J. EDER

GROSS, F. *Foreign Policy Analysis*. New York: Philosophical Library, 1954. Pp. xxiv, 179.

SCHIFFER, W. *The Legal Community of Mankind*. New York: Columbia University Press, 1954. Pp. x, 367.

Foreign Policy Analysis presents a sane pioneer approach to the method, technique, and theory in a field sadly bare of clarity and definition. Too

often foreign policy has been conceived as a product of the individual genius of men to whom destiny has confided the guidance of nations. To help disabuse the interested of this misconception, and to help systematize in certain order rampant unmethodological speculation, this scientific analysis has been written.

There are eight chapters in the book, in the course of which the following topics are treated: Scientific Approach, Causation, Semantics and Terminology, Ideology and Objectives, Factors (e.g., geographic, economic, demographic, military, etc.), Policies, and Forecast or Prediction. The meaning of hypotheses, the nature of value judgment, the role of fact selection—all are matters either neglected, or taken for granted, or misunderstood, and consequently in need of the particularization and identification that this book provides. A representative proposition is as follows: The study of foreign policy consists of three interdependent parts: Ideology and Objectives (culture, ideas, politics, vision, the irrational, and national interest), Factors (social-political, culture, social-psychological, and the previously mentioned factors), and Policies (strategies, tactics, alternatives). As *Foreign Policy Analysis* indicates, extension and ramification of these referents, with numerous fact situations cited to bear out elements of the analysis, results in a demarcated body of knowledge which defines the existence of certain problems, and suggests consistent approaches in their evaluation through understanding of the relations between facts.

In *The Legal Community of Mankind*, a careful and critical examination of the historic bases of the concept of world organization is presented. Approaching the theory of international law in broad, historical terms, the book begins with a discussion of the collapse of Western Christian Unity in the late Middle Ages, which period was marked by the recognized right of the Pope to coerce aggressors or disturbers of the established order, and of the advent of a science of international law, typified by the seminal thinking of Grotius, Pufendorf, Christian Wolff, Locke, Kant, Mill, Lecky, Laurent, and Oppenheim. The transition from abstract, unenforceable, natural law, to progressivist and positivist conceptions requiring state consent as a condition precedent to the establishment of a valid rule of international law is discernible throughout.

Sharply scrutinizing the concept of the community of mankind, the theory of natural law, and the belief in progress, the argument leads to an examination of the League of Nations, an organization which evolved through a felt need, following World War I, but which was based upon the expectation that world disruption could be dealt with as though the peoples of the earth, united by non-political interests, already had reached a degree of moral perfection and reasonableness which could assure their peaceful co-existence. In this connection, the legal monism of George Scelle, that a legal order exists above the states, instead of existing only between them, the concept of dualism, that states co-exist as naturally free and equal persons, and that there is a complete separation of the international domain from the municipal sphere, are significant. The sum total of Dr. Schiffer's thesis is that, in the light of the independence of international entities, the idea of the League was a contradiction, since the League, representing the universal community, was entitled to intervene in order to give peoples the liberty to which they aspired; and that all schemes for world organizations have tried to create a new world without basically changing the conditions plaguing the old. The United Nations, an outgrowth of the League of Nations, necessarily falls heir to the same criticism.

Dr. Schiffer concludes that the creation of a world state is a concrete political problem which can be solved only by political action. A policy

designed to bring about the transformation of the world must be different from a policy which is based on the idea that the division of the world into states will be and should be maintained. The League and the UN were compromises that sought to avoid the material and moral risks which ordinarily result from the necessity of reaching political decisions and engaging in political activity designed to bring about concrete improvements of political and social conditions.

The analysis made in this study does not purport to lead to any conclusion with regard to the question as to whether or how a world state should be established at the present time. Its sole object is to analyze a historical pattern of thought which expected that an organization, which was not a world state, would initiate an era of universal peace, security, and order. This book is a brilliant piece of sound scholarship, thoroughly documented, and based upon wide experience and research. It is a major systematic contribution to the history of political thought.

HILLIARD A. GARDINER

WALKER-WATSON, W. *The Finance of Landownership*. London: Frederick Warne & Co., 1954. Pp. x, 245.

Since the outbreak of hostilities in World War II, the financial burdens imposed upon landowners in England by government legislation and concomitant rising costs have made landowning in that country somewhat less than a profitable enterprise. Indeed, Mr. Walker-Watson relates in his treatise that the net result of the combined operation of these phenomena has been "to put the average landowner in the position of spending on repairs and improvements approximately one-third more than his annual income." (p. 10) Undaunted by this rather discouraging prospect, however, many men still feel the urge to own land. It is for these intrepid ones, especially those who own, or would own, agricultural land, that the author has labored in this work to evolve a policy for the future "that would enable private landownership to rank once again as a profitable undertaking." (p. 17).

Mr. Walker-Watson does not offer any *ad hoc* policy to be followed by landowners if they would better their present and future economic positions. Instead, he carefully outlines the problems of landownership and the considerations that should be uppermost in the landowner's (or would-be landowner's) mind throughout the usual and the anticipatory phases of proprietorship before presenting the policy for the future that he advocates. He presents in detail the priority considerations relating to purchase, disposal, mortgage, taxation, insurance, maintenance, improvement, and accounts, and complements the individual discussions of these topics with a brief of the knowledge he has of them and with his suggestions as to how best to deal with them. For instance, a certain abatement of estate duties is available when agricultural land is a part of a decendent's estate. This fact is of importance to a landowner contemplating the disposal of his land by sale or gift. It must be weighed not only with the immediate advantages of the contemplated disposition, but also with the consequences of leaving an estate to which the abatement would not be applicable.

Since government activity in the form of regulatory and directory legislation has contributed greatly to the present financial difficulties confronting landowners in England, the author postulates further government activity as a necessary element to an effective policy for the future. The good management practices which he urges as part of his policy would alone be ineffective; therefore, the government must permit an owner of an agricultural estate to put sums aside tax-free as a reserve for repairs and improvements. Unless a landowner can

"plough back" profits, there is little point in his striving for an increased income. The government must also recognize that "an agricultural estate is a fixed asset for agricultural production, rather than some thing to be realised in the open market." (pp. 208) Such recognition, extended in the form of relief from estate duty would mitigate the extent to which property is presently forced on to the market in cases where the owner has otherwise no intention of selling.

This book is a real contribution of practical significance to every landowner in England, agricultural or otherwise. Its simple style and easy readability recommend it to all as a handbook of the finance of landownership.

J. J. QUINN

STEINER, G. A. *Government's Role in Economic Life*. New York: McGraw-Hill Book Company, Inc., 1953. Pp. xi, 440.

Written primarily as a college textbook, Mr. Steiner's study is divided into three parts. In the first part, entitled the "Evolution of the Problem," the author explains how and why government has been expanding its controls over the economic life. The second part is devoted to an analysis and evaluation of the New Deal and World War II periods, while the third part deals with current problems and seeks to establish certain "guides for evolving public economic policies" for the future.

In pursuing his topic Mr. Steiner has four major objectives in mind: (1) to help the student of public economic policy to understand and think intelligently about American experience regarding the shifting role of government in economic life; (2) to develop a suitable methodology for coming to grips with the problems of public economic policy; (3) to present the major problems and issues, both in the aggregate and in various areas of action; (4) to set forth underlying principles which may be useful in guiding the evolution of public economic policy.

It can be said that these objectives have been served adequately and Mr. Steiner has written a book well suited as a textbook for courses on the subject.

The Teaching of the Social Sciences in the United Kingdom. Paris: UNESCO, 1953. Pp. 140.

This booklet was compiled chiefly in order to serve as a general introduction and guide to prospective students at, or visitors to, the universities of the United Kingdom. The material derives from an enquiry into the teaching of the social sciences which has been conducted by UNESCO.

The introduction deals with "The General Organization of Universities and of other Institutions for the Promotion of Higher Learning," and notes, among other things, that though the British Universities may vary in antiquity and outlook, some being medieval, some of the 19th century, but the bulk belonging to the lifetime of a generation still living, they are all identical in one cardinal matter, which is that there is no distinction between public or state universities and private or voluntary interests, all British universities being essentially voluntary or private in the sense that they are entirely self-governing, although publicly assisted. There are five other chapters in the booklet, dealing, respectively, with the teaching of Economics, Political Science, Social Anthropology and Social Psychology, International Relations, and Legal Education, the latter being largely outside the Universities. Appended is a list of the principal curricula and degrees offered in each field in each institution. The evolution, structure, and organization of each field of study at the respective institutions is treated substantively throughout the text, and much may be gleaned with respect to trends, practices, objectives, and prospects in British social studies.

The chapter on Legal Education

deals with the legal profession and preparation therefor in England and Wales, Scotland, and Northern Ireland, and makes much of the point that the object of university legal training is not that of the professional law school, for law is taught in the universities "not as an exercise in professional technique, but in relation to its place in the world in which we live." The barrister-solicitor distinction is discussed, and some space is devoted to a discussion of comparative legal studies in the United Kingdom. Comparative law is reported to have established itself in the universities of Great Britain as a general method of instruction and as an instrument of advanced study and research; the fact that comparison provides a valuable addition to existing methods in supplying a background against which the nature and operative effects of national rules of law can be displayed in relief has been recognized. Brief details are given of those universities which have recognized comparison as an instrument of legal education. HILLIARD A. GARDINER

MANGONE, GERARD J. *A Short History of International Organization.* New York: McGraw Hill Book Company, 1954. Pp. ix, 326.

By and large, this book succeeds in portraying the development of international organization along constitutional lines, with attention to procedure and law, tending to indicate a potential, though not necessarily inevitable, growth toward world order. It is not, as is much of the scholastic material on the subject, a seed catalogue of international organizations, copying in detail every charter, meeting, or diplomatic delegation. It emphasizes, on the contrary, movement rather than events, and composition rather than items. The United Nations, man's most recent attempt at international symmetry, is regarded as a part of a process; the Concert of Europe, the League of Nations, the international administrative agencies of the 19th and 20th centuries, and the Regional International Organizations, share text space, ostensibly to impart a sense of the achievements, as well as frustrations, of ordered international society.

There are nine chapters in the book, and each contains a substantive discussion of major phases in the evolution of world organization. At the end of each chapter there is an appendix which contains excerpts from documents representative of the subject treated in the chapter. There are thirty-three such items. Thus, Chapter I, dealing with international organization before Napoleon, has, in its appendix, abstracts of the Treaty of Munster (1648) and the Treaty of Utrecht (1713). Chapter two deals with what is termed the Age of Consultation, and discusses the Treaty of Chaumont, the Conference of Vienna, the Quadruple Alliance, and the Concert of Europe, among other milestones in that era. The third chapter deals with Nineteenth Century Administration, and the fourth is a very excellent one on the Development of International Law. Subtopics treated in this chapter are the religious bases of international law, and its secularization; the trend to a positive law of nations; the slave trade and the regulation of fisheries; safety at sea; rules of maritime and land warfare; arbitration and disarmament; and the Hague Peace Conferences of 1899 and 1907. Chapters five through nine are devoted to the League of Nations, the United Nations, Twentieth-Century Administration, Regional International Organization, and the future of International Law and Organization.

"The history of international organization indicates a slow but reasonable way to a respectable world society," concludes the author in his final chapter and his work presents a highly articulate, well-organized, purposeful plaint in substantiation of this proposition. Multi-dimensional and functional, it is a step in the direction

of living law and administration, in contrast to the apparently unsuccessful dead hands of the past. With approaches of this nature, it is not improbable that the patient pursuit of peace through international organization may be materially sustained.

HILLIARD A. GARDINER
EDWARD TABORSKY

ADAMS, HENRY CARTER. *Relation of the State to Industrial Action and Economics and Jurisprudence.* New York: Columbia University Press, 1954. Pp. viii, 182.

One of the series of editions and studies issued to commemorate the bicentennial of Columbia University, the two essays by Henry Carter Adams, economist and teacher during the latter part of the 19th century and the early twentieth, which comprise the major portion of this book, deal with the basic tradition and philosophy of modern American economic reform. In the introductory essay by Joseph Dorfman, Professor of Economics at Columbia University, Adams is termed "The Harmonizer of Liberty and Reform," and his role during a period of social turmoil and intellectual upheaval is described. Adams on the theory of marginal utility, the wages-fund doctrine, business cycles, foreign trade, bimetalism, and Gresham's law, as described by Professor Dorfman, provides helpful background material.

Adams's story is the story of a practitioner of an infant social science in an age astir with intellectual as well as material progress. His task was to redeem economics from the contempt of the business community and the suspicions of workingmen. In its performance he was forced to face the problems of political and social democracy. In *The Relation of the State to Industrial Action*, an attempt is made to relate the problem of local government to the greater social problem of which it is deemed a subordinate part. The proper extent and nature of state function is discussed, and it is suggested that the policy of restricting public powers within the narrowest limit, which was so very much the case when Adams wrote, tends to weaken government and render it inefficient. The control of the state over industries should only be co-extensive with the application of the law of increasing returns, however. The conservation of true democracy by weakening the influence of commercial democracy is the avowed purpose of the essayist.

In *Economics and Jurisprudence*, three propositions are developed: (1) the individualism of the 18th century fails to express the moral necessities of the present (late 19th and early 20th century) industrial order; (2) the principle of responsibility which is the cornerstone of English jurisprudence is incapable of industrial application under existing industrial conditions; (3) the realization of industrial liberty necessitates the fulfillment of certain conditions. The workings of self-interest in the industrial field are held to be out of harmony with the ideals of justice. The regime of contract, an heirloom of English political economy, is held to be unworkable unless all men are in substantially the same condition concerning property insofar as the relation established between proprietorship and industry is concerned. A theory of industrial property adjusted to the needs of the times must express the rights of individuals associated together in an industrial unit and must express the duties of these industrial units to the public at large.

The latter essay, initially presented as an address before the American Economic Association, is followed by commentary made by eminent educators of the day. The striking relevance of Adams's thinking to our own time is made more explicit by a reading of this material and the relating of Adams's views to the social, economic, and ethical context in which he expressed himself.

HILLIARD A. GARDINER

R. B. H. Gradwohl, *Legal Medicine*. St. Louis: C. V. Mosby Co., 1954. Pp. xvii, 1093.

The work edited by Dr. Gradwohl may be described as a massive collection of 39 articles relating to a wide assortment of medicolegal problems. Six of the articles deal with problems essentially of a legal nature; the rest cover a number of fairly unrelated medical subjects.

All of the legal articles deal with interesting and timely subjects, and their reading should prove remunerative to the lawyer and physician in general practice who might wish to refresh his recollection or acquire a basic introduction in the fields concerned. The most instructive of these, from that standpoint at least, might be the discussion on the legal aspects of medical practice, which is a brief but well-organized presentation of the concept of malpractice in American law. As this article is rather meagerly annotated, with cases primarily from the jurisdiction of Missouri, its value to lawyers might be limited, but it should serve as a clear and concise introduction to that important area for the practicing physician.

Most of the medical subjects discussed relate to the pathology, identification and evidentiary aspects of a number of causes of sudden death. These articles are amply illustrated and present a number of problems frequently confronting medical examiners, coroners, law enforcement officers generally, and more infrequently, defense lawyers in criminal cases. The other medical discussion can only be described as narrowly technical and of necessity intended primarily for physicians.

The work can hardly be considered a comprehensive text on any of the subjects it touches on; it is, however, a symposium on medicolegal problems with a wide scope which should be of general interest, and occasionally of great value, to practitioners in law and medicine and to those in related fields.

GEORGE G. LORINCZI

Cleveland Bar Association Journal. A series of articles on comparative law appearing in the Cleveland Bar Association Journal reveals the increasing interest of the practicing lawyer in the legal systems of other nations. Already three of the series have been published: "Comparative Law: The Netherlands" (August, 1954), "Comparative Law: England" (October, 1954), "Comparative Law: Yugoslavia" (March, 1955). The first and third of these were written by lawyers who are native to The Netherlands and Yugoslavia—Eduard Emmering, Esq., a member of the District Court at Amsterdam, and Matej Roesmann, Esq., born in Yugoslavia and educated in Yugoslavia and Austria but now a member of the Ohio Bar. Mr. Ivan Miller, chairman of the Cleveland Bar Association Committee on Comparative Law, is general editor of this series. He prepared the second article of the series on England.

The purpose of this published material is to afford to the practicing lawyer at the local bar level opportunity to understand the legal systems of other nations and other cultures. Seldom does the average lawyer receive legal materials containing such information. When and if he does receive them he has no desire to read them. In a bar association periodical, however, the short length of the article and the popular method of presentation stimulate reading—the first step toward understanding and interest.

OLIVER SCHROEDER, JR.

A Uniform System of Citation. Form of Citation and Abbreviations. 9th edition. Gannett House, Cambridge, Massachusetts, U.S.A.: The Harvard Law Review Association, 1955. Pp. 92.

This "Blue Book" on "Form of Citation and Abbreviations," now in a new, the ninth, edition, which most American law reviews use and which secures an almost uniform system of citation and abbreviation for the United States, is a joint effort of the (student) editors of four law reviews, Columbia Law Review, Harvard Law

Review, University of Pennsylvania Law Review, and Yale Law Journal. Improved from edition to edition, it can be considered, on the whole, as a rather satisfactory tool. The foreign lawyer, puzzled by our abbreviations, here will find the rules on how to cite decisions and reports, statutory materials, books and pamphlets, periodical materials, and government publications; he will learn about the citation order and the intrinsic meaning of the introductory signals: "Accord", "See", "Cf.", "But see", "But Cf.", and so forth. He is instructed on capitalization and punctuation and italicization and will find a list of abbreviations running over twenty pages. The part on foreign materials has been substantially extended—another proof of the greater attention given to foreign sources in American legal writings. The foreign reader will not necessarily agree with the abbreviations suggested, especially where they do not follow the "local law," but general agreement on citation and abbreviation can never be expected, domestically or internationally, and the hope remains that the next edition may show an "evolution of the law." No copyright exists, we think, on the idea of developing a uniform system of citation for one's country.

K. H. N.

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CLASSIFIED ADVERTISEMENTS

Bulletin

Special Editor: KURT H. NADELMANN
American Foreign Law Association

THIRTIETH ANNIVERSARY OF THE AMERICAN FOREIGN LAW ASSOCIATION

On the 17th of February 1955, the American Foreign Law Association held a special meeting at the House of the Association of the Bar of the City of New York to commemorate the thirtieth anniversary of the founding of the Association (February 24, 1925). Messrs. Phanor J. Eder and Otto Schoenrich, members of the first General Council, were elected Honorary Members of the Association. The meeting, with Mr. Otto C. Sommerich, president, in the chair, was addressed by Mr. Phanor J. Eder, who recalled the history and activities of the Association, and by Judge Jerome N. Frank, of the United States Court of Appeals for the Second Circuit, who spoke on "Civil Law Influences on the Common Law." A Summary of the remarks by Mr. Phanor J. Eder on "The American Foreign Law Association" follows:

The thirtieth anniversary of our Association should not be permitted to pass without commemoration and tribute especially to its first president, William W. Smithers, of Philadelphia.

The origin of our Association is indirectly connected with the sad history of the Comparative Law Bureau of the American Bar Association. It was organized August 28, 1907. Its first director was Simeon E. Baldwin, Dean of the Yale Law School and ex-Governor of Connecticut, but the moving spirit was Smithers, ably seconded by Robert P. Shick also of the Philadelphia Bar.

The Bureau published an Annual Bulletin from 1908 to 1914, comprising a survey of legislation, court decisions and literature, and articles of merit. Smithers was chairman of the Editorial Board, which included a distinguished group of comparatists. Later Shick became Chairman of the Editorial Board and Secretary of the Bureau.

The Bureau sponsored the publication of the translation of the Argentine Civil Code by Frank L. Joannini (1917); of the Visigothic Code (1910) and The Siete Partidas (1931) by Samuel P. Scott, with an introduction by Judge Charles Sumner Lobingier, and a bibliography by John Vance, Law Librarian of Congress; and of the Swiss Civil Code by Shick.

The American Bar Association refused further funds for the publication of an Annual Bulletin, but at first permitted the Bureau to use the quarterly A.B.A. Journal for its contributions, 1915–1917. Thereafter the A.B.A. completely withdrew its support and refused further space in the Journal. This spelled the doom of the Bureau, although it continued a nominal existence. Its conspicuous success while it lasted was largely due to the energy, enthusiasm, and ability of Smithers and Shick.

For some years, the comparative law movement in this country was at its lowest ebb. The American Foreign Law Association was brought into being in 1925 to fill the gap caused by the virtual disappearance of the Comparative Law Bureau. The new organization was suggested, if my memory serves me right, by a few of the younger members of the New York Bar: G. Evans Hubbard, Rufus Trimble (who later was president of the Association), James Murdoch, Adolph Berle, Jr., and his partner Guy Lippitt; they enlisted my interest, and I in turn naturally looked to the members of the Comparative Law Bureau and to my friends among the practitioners engaged in foreign work. The initiative was taken by Hubbard, who had just returned from France. His original idea was to form an American Branch of the Société de Législation Comparée, which had a few American members, including myself. We decided, however, that it would better serve our purposes to found a new body. The acting chairman pending organization was Guy Van Amringe, founder and chairman of the Foreign Law Committee of the Association of the Bar of the City of New York. The chairman of the committee to draft the Constitution was Judge Lobingier; other members of the Committee were Charles B. Fernald and myself. The acting Secretary was Hubbard. A nominating committee was appointed, of which Ernest Angell was chairman, Lippitt and Taylor members. Angell at that time was a member of my firm, Hardin, Hess & Eder. He succeeded in having two very distinguished men accept appointment to the Council: the Hon. Theodore E. Burton, ex-Senator from Ohio, and Professor Manley O. Hudson. The other members of the Council selected by the nominating committee were Charles B. Fernald, Judge Lobingier, Judge Otto Schoenrich, William W. Smithers, Guy Van Amringe, Arthur K. Kuhn, and Phanor J. Eder.

Smithers was elected the first president, an obvious choice. Fernald, Lobingier, Schoenrich, and Kuhn were all later to serve in that office.

The Association as you know has had constant luncheon and dinner meetings, the quality of the addresses being on the whole unusually high and the discussions lively. Many of these addresses were published in its Proceedings issued continuously since 1926, which are to be found in the libraries; others have been the basis of law review articles. We have had some very distinguished speakers: Sir Frederick Pollock, Sir Owen Dixon, of Australia, the Attorneys General of New Zealand and of Israel, the Chief Justice of Israel; a President of Panama, Ricardo J. Alfaro, who twice addressed us on the subject of Trusts abroad and participated in the discussion on the same subject with our eminent French colleague, Pierre Lepaulle. The geographical range of our subjects has literally led us from China and Japan to the Poles, from Mexico and Brazil to Turkey and Soviet Russia, from war-torn England to post-war Germany. We have dealt with taxation, trusts, gold clauses and foreign exchange, protection of foreign investments, confiscation and expropriation, corporations, bankruptcy, international divorces, foreign judgments, cartels, labor, the Nuremberg trials, judicial assistance and proof of foreign law, and numerous other practical topics of live interest.

The Association published between 1926 and 1937 working bibliographies on the laws of Colombia, the Scandinavian countries, Bolivia, France, Puerto Rico, Soviet Russia, Dominican Republic, Haiti, Uruguay, Curaçao, and Central America, the last named by Schuster. We also published a Bulletin in 1950 and 1951, under the editorship of Kurt Nadelmann.

During my incumbency as President, two events of importance for the history of the Association occurred, both starting in the year 1950. The efforts of the Association and of other interested groups to establish a Journal of comparative law were at last rewarded. At a meeting of the Council on May 24, 1951, the Association was authorized to become a sponsor member of the American Association for the Comparative Study of Law Inc., the primary purpose of which was to publish the American Journal of Comparative Law. The first issue of the Journal appeared early in 1952, and it has just completed its third year, under the able editorship of Hessel E. Yntema, vice-president of this Association. The representative of the Association on the Editorial Board has been Kurt Nadelmann, and our bulletin has been continued by him in the pages of the Journal. Our Martin Domke has had charge of the Digest of cases in the American courts involving foreign law. I have had the honor, as President of the new American Association for the Comparative Study of Law Inc., to serve as chairman, *ex officio*, of the Editorial Board.

Chiefly through the efforts of Professor John Hazard, our Association became the United States national member of the UNESCO International Committee on Comparative Law. The Council authorized the officers to apply for such membership on May 22, 1950. In order to fully qualify for this new role, it became necessary to convert our Association from a predominantly local group of New York practitioners to a nation-wide organization, and to include more members from the professorial groups in the law schools. Our efforts to enlarge the membership along these lines were successful and our membership roll has steadily increased. It is now nearly 300. This contrasts with our 1925 membership of 42 American lawyers and 9 foreign lawyers as associate members. A few years ago we abolished the distinction between active and associate members.

Chiefly from lack of funds, we have not accomplished all that we would have liked to do, but nevertheless those of us who had some part in the foundation can draw satisfaction from the history of the Association.

REPORTS

AMERICAN FOREIGN LAW ASSOCIATION—At the Annual Meeting held in New York City on March 25, 1955, the following members of the General Council, Class of 1958, were elected: Messrs. George J. Eder, Phanor J. Eder, David E. Grant, Kurt H. Nadelmann. In addition, Professor Arthur von Mehren was elected a member of the Class of 1957 to fill the vacancy caused by the death of Mr. Arthur K. Kuhn. The General Council, therefore, consists of: Martin Domke, Victor C. Folsom, Otto Schoenrich, David S. Stern (Class of 1956); Max Rheinstein, Angelo P. Sereni, Harold Smith, Arthur von Mehren (Class of 1957); George J. Eder, Phanor J. Eder, David E. Grant, Kurt H. Nadelmann (Class of 1958). At the meeting of the General Council held immediately following the meeting of the Association, the following officers were elected: President:

Otto C. Sommerich; Vice-Presidents: Alexis C. Coudert, John N. Hazard, Hessel E. Yntema; Treasurer: Robert R. Boot; Secretary: Albert M. Herrmann, One Wall Street, New York 5, N. Y.

During the past year, luncheon meetings in New York City were addressed by: Professor Harold J. Berman, of the Harvard Law School, on "Some Legal Aspects of Soviet Foreign Trade;" Professor Philip C. Jessup, of Columbia University School of Law, on "Can Law Protect Foreign Investments;" Justice S. Z. Cheshin, of the Supreme Court of Israel, on "Administration of Justice in Israel;" Dr. Fritz E. Oppenheimer, on "What Took Place at the Military Surrender of Germany, and its Consequences;" Professor Arthur Lenhoff, of the University of Buffalo Law School, on "Reciprocity, a Vexing Problem in Private and Public International Law." In addition, the Association participated in a joint supper with the Committee on Comparative Law of the Association of American Law Schools followed by a forum discussion on "Problems in Proving Foreign Law in United States Courts." It held a special meeting, reported separately, to commemorate the thirtieth anniversary of the founding of the Association.

The Association continued to act as American Representative on the International Committee for Comparative Law. It continued its sponsoring membership in the American Association for the Comparative Study of Law, Inc., publisher of the American Journal of Comparative Law.

EIGHTH CONGRESS OF THE INTERNATIONAL FISCAL ASSOCIATION—The International Fiscal Association held its 8th congress in Cologne, Germany, September 21 to 23, 1954, with more than five hundred participants representing over twenty countries. Dr. Ernst Hilbert, of the Gutehoffnungshütte Aktienverein, was in the chair. Mr. Mitchell B. Carroll, president of the Association, discussed in his opening address the significance of the Income Tax Convention between the United States and Western Germany from the viewpoint of encouraging American investments in Western Germany.

Four topics were on the agenda: Tax Measures intended to Facilitate International Movement of Capital, with Professor Günter Schmölders, of the University of Cologne, as general reporter; Tax Measures to Encourage the Formation of Capital, with Professor Jean Baugniet of the University of Brussels, as general reporter; Taxation of International Corporations, with Professor Ottmar Bühler as general reporter; Double Taxation of Corporate Income, first as the Profit of the Corporation and then as the Income of the Shareholders, which was discussed on a preliminary basis for further consideration in a later congress. On the first three topics, resolutions were adopted by the congress, the first emphasizing the importance of a return to the free convertibility of currencies on the one hand and a policy of financial stability and equilibrium of the balance of payments on the other, condemning, with regard to taxation, any legal or administrative measures discriminating against capital and enterprises from abroad, and recommending all means to unify tax systems and prevent double taxation; the second recommending a limitation of the burden of progressive taxation which should not exceed, as a maximum, the "psychological breaking point of 50%;" the third seeking to enunciate some general principles for the allocation of income and expenses between the establishments in two or more countries in which an enterprise may operate.

VARIA

HAGUE ACADEMY OF INTERNATIONAL LAW—The 1955 session of the Hague Academy of International Law will run from July 18 to August 13, 1955. The lectures will be in the fields of: History of International Law; Principles of Public International Law; Private International Law; and International Organization. The program may be obtained from the Secretariat, Peace Palace, The Hague.